FINAL REPORT

ENDURING POWERS OF ATTORNEY IN NOVA SCOTIA

Law Reform Commission of Nova Scotia
September 1999

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission.*

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The Law Reform Commission receives funding from the Nova Scotia Department of Justice and the Law Foundation of Nova Scotia. The Commission gratefully acknowledges this financial support.

Canadian Cataloguing in Publication Data:

Law Reform Commission of Nova Scotia, Final Report, *Enduring Powers of Attorney in Nova Scotia,* September, 1999.

Law Reform Commission of Nova Scotia

To: The Honourable Michael G. Baker
Minister of Justice

In accordance with section 12(3) of the *Law Reform Commission Act*, we are pleased to present the Commission's Final Report on Enduring Powers of Attorney in Nova Scotia.

Gregory North, Q.C.
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Dawn Russell
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ENDURING POWERS OF ATTORNEY IN NOVA SCOTIA

SUMMARY

In June 1997, the Law Reform Commission of Nova Scotia commenced its study of the law of enduring powers of attorney. Nova Scotia has a *Powers of Attorney Act,* which allows for enduring powers of attorney (EPAs). The Commission learned, however, of concerns that the current law is incomplete. For example, there are concerns that the current law lacks adequate procedural safeguards to prevent the financial abuse of people who appoint someone else to make financial decisions on their behalf. As well, the legislation does not address when EPAs come into effect. The Commission decided to examine how people who give EPAs can be better protected and have their wishes implemented more effectively.

Powers of attorney generally

A power of attorney is a legal document which authorizes a person or company to act on behalf of another person to deal with or dispose of his or her property. The person receiving the power to act is called the "attorney". The person giving the power is called the "donor". There are two types of powers of attorney: a general power and a limited power. A general power of attorney can be all-encompassing and can allow the attorney to make virtually any type of decision relating to the donor's property. A limited power is more restricted and is usually used to complete a specific financial transaction when the donor is on vacation, is ill or is otherwise unable to attend in person.

At common law, a power of attorney automatically terminates upon the death or bankruptcy of the donor. The mental incompetence of the donor also ends the power of attorney. A power of attorney is therefore not a useful device for managing a person's affairs in the event of his or her mental incompetence. As a result, EPAs, powers of attorney which "endure" beyond the onset of the donor's mental incompetence, have been recognized by all Canadian provinces.

Contingent powers of attorney

Most Canadian provinces which allow EPAs also contemplate the possibility that the power of attorney will come into effect only upon the occurrence of a future event. This postpones the attorney's authority until the future event occurs. The power of attorney is therefore said to be "contingent" upon the future event. The most common event, or contingency, specified in such powers of attorney is the mental incompetence of the donor. If the EPA is to be contingent, this must be explicitly stated. If it is not explicitly stated, the EPA takes effect from the moment it is signed.

The Discussion Paper

In June 1998, the Commission published a Discussion Paper, *Enduring Powers of Attorney in Nova Scotia*. Among its suggestions, the Discussion Paper proposed that a person giving an EPA should be able to name any number of attorneys to act on his or her behalf. It was suggested that EPA legislation should deal specifically with contingent powers of attorney, those which do not take effect until a particular event has occurred. The Discussion Paper also suggested when a duty to act should be imposed on an attorney appointed under an EPA. Another suggestion was that in the event of an EPA which had been terminated or was invalid, an attorney would be protected from liability for having acted in good faith if he or she did not know and had no reasonable grounds for believing that his or her authority had been terminated or lost. In addition, the Discussion Paper invited comment on whether a Certificate of Independent Legal Advice should be required in order for an EPA to be valid.

Having taken into account all comments received concerning the Discussion Paper, the Commission has prepared this Final Report.

Recommendations for reform

- An attorney must be mentally competent and of the age of majority, the Public Trustee, or a government-regulated financial institution. An attorney must not be an undischarged bankrupt.

- A donor should be able to name any number of attorneys to act on his or her behalf and should be able to appoint alternate attorneys to act successively. If more than one attorney is named, whether they are to act jointly or successively should depend on the language used in the EPA.

- When the donor is mentally competent, but otherwise incapable of reading or signing an EPA, an individual (other than the attorney or the attorney's spouse) should be able to sign it on the donor's behalf. The EPA must be signed in the donor's presence, at the donor's direction and in the presence of two or more witnesses who are present at the same time.

- Mandatory legal advice should not be required for an EPA to be valid.

- Registration of EPAs should not be mandatory.

- EPA legislation should deal specifically with contingent powers of attorney. If an EPA is contingent upon the onset of the donor's mental incompetence, the donor should be able to specify a person who would conclusively determine when the contingency has occurred. In addition to the person named by the donor, a practicing physician must agree in writing that the donor is mentally incompetent. If the EPA

does not specify a person to determine the donor's mental incompetence, or if the specified person refuses or is unable to make the determination, then the certificates of two medical practitioners would be required to prove that the contingency has occurred.

- When the donor of an EPA becomes mentally incompetent, the attorney has a duty to act if he or she knows or ought reasonably to know that the donor is mentally incompetent, and if the attorney has assumed management of the estate or contracted with the donor to do so.

- Legislation should authorize the release of confidential information to authorized people concerning the donor's mental and physical health for the limited purpose of determining whether the contingency of mental incompetence has occurred.

- If the EPA has been terminated or is not valid, an attorney should be protected from liability for having acted in good faith if the attorney did not know and had no reasonable grounds for believing that the attorney's authority had been terminated or lost.

- The donor should be able to request an accounting at any time. When the donor is mentally incompetent, the attorney should be required to provide an accounting upon the demand of any person named for that purpose in the EPA. If the donor does not name anyone in the EPA, or if the named person is the attorney or the attorney's spouse or is deceased or mentally incompetent, the attorney shall provide an annual accounting to the donor's nearest relative.

- If the attorney's authority under the EPA has been terminated, an attorney's act should be valid and binding in favour of and enforceable against any person who did not know of the termination.

- An attorney should be able to renounce an appointment by giving notice to the donor. If the donor is no longer mentally competent and the attorney has assumed management of the estate or contracted to do so, the attorney must apply to court in order to renounce the appointment.

- An EPA should terminate if it is revoked by the donor or the donor dies. An EPA should also terminate upon the bankruptcy of the attorney; the death or mental incompetence of the attorney; the renunciation of the attorney; the coming to pass of a time or event specified in the EPA; or the appointment of a guardian under the *Incompetent Persons Act*.

- EPA legislation should require that a donor who wishes to revoke an EPA must provide notice to the attorney.

- The courts should continue to be authorized to remove an attorney upon application by a nearest relative, by an attorney, or by a named alternate, where the donor had specified an alternate attorney. Substitution should only be allowed where the donor had specified an alternate attorney.

LES PROCURATIONS PERPETUELLES EN NOUVELLE-ECOSSE

SOMMAIRE*

Au mois de juin 1997, la Commission de réforme du droit de la Nouvelle-Ecosse a initié une étude du droit relatif aux procurations perpétuelles. La législation néo-écossaise comporte une *Loi sur les procurations* qui permet les procurations perpétuelles. Néanmoins, il a été porté à la connaissance de la Commission que la législation actuelle est incomplète. Par exemple, cette législation ne prévoit pas de mesures de protection appropriées afin d'empêcher que l'on abuse financièrement des personnes qui ont nommé un tiers chargé de prendre des décisions financières en leur nom. La législation est aussi muette sur l'entrée en vigueur des procurations perpétuelles. La Commission a donc décidé d'étudier les mesures de protection des personnes qui donnent des procurations perpétuelles et la façon d'assurer que les souhaits d'une personne soient exécutés avec efficacité.

Les procurations en général

Une procuration est un document juridique en vertu duquel une personne ou une compagnie est autorisée à agir au nom et lieu d'une autre personne dans le but de gérer ou de disposer de ses biens. La personne qui reçoit ce pouvoir d'agir se nomme le "mandataire". La personne qui octroie ce pouvoir se nomme le "mandant". Deux types de procurations existent: la procuration à portée générale et la procuration à portée limitée. Une procuration à portée générale peut être très étendue et peut donner au mandataire un pouvoir décisionnel relativement à tout type de décision concernant les biens du mandant. Une procuration à portée limitée est plus restreinte et est utilisée habituellement en conjonction avec une transaction financière spécifique alors que le mandataire est en vacances, est malade ou ne peut agir en personne pour d'autres raisons.

En droit coutumier et jurisprudentiel (common law), une procuration s'éteint automatiquement avec le décès ou la faillite du mandant. L'inaptitude mentale du mandant met aussi fin à la procuration. Une procuration n'est donc pas un outil efficace pour gérer les affaires d'une personne dès lors que l'inaptitude mentale survient. Il en résulte que les procurations perpétuelles ont été reconnues par toutes les provinces canadiennes comme des procurations qui subsistent au-delà de l'inaptitude mentale du mandant.

Procuration contingente

La plupart des provinces canadiennes qui reconnaissent les procurations perpétuelles acceptent

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* Traduit de l'anglais par Me Nathalie Bernard, LL.M. (Dalhousie University), LL.B. (Dalhousie University), LL.B. (Université Laval).

aussi la possibilité que la procuration n'entre en vigueur seulement si un événement futur survient. Cela reporte donc l'exercice des pouvoirs du mandataire jusqu'à ce que l'événement futur se produise. La procuration est donc considérée comme dépendante d'un événement futur. L'événement futur ou la contingence spécifiée le plus souvent dans les procurations est l'inaptitude mentale du mandant. Si la procuration perpétuelle est contingente, cela doit être explicitement prévu. Si cette mention n'apparaît pas explicitement, la procuration perpétuelle entre en vigueur dès sa signature.

Document de réflexion

Au mois de juin 1998, la Commission a publié un Document de réflexion intitulé, *Les procurations perpétuelles en Nouvelle-Ecosse*. Ce document proposait entre autres suggestions qu'une personne donnant une procuration perpétuelle puisse nommer autant de mandataires qu'elle le désire afin d'agir en son nom et lieu. Il fut aussi suggéré que la législation relative aux procurations perpétuelles traite explicitement des procurations contingentes, c'est-à-dire celles qui n'ont d'effets que lorsqu'un événement particulier se produit. Le Document de réflexion traitait aussi du devoir d'agir qui devrait incomber dans certains cas au mandataire nommé en vertu d'une procuration perpétuelle. Dans le cas où une procuration prendrait fin ou serait invalide, on suggérait aussi que le mandataire ne soit pas considéré responsable de ses actions posées en toute bonne foi si le mandataire ignorait que la procuration avait pris fin et n'avait pas de motifs raisonnables lui indiquant que ses responsabilités avaient pris fin. Finalement, le Document de réflexion invitait le public à faire des commentaires sur la question de savoir si une procuration perpétuelle devrait être accompagnée d'un Certificat de consultation juridique afin d'être valide.

Sur la base de tous les commentaires reçus relativement au Document de réflexion, la Commission a préparé ce Rapport final.

Recommandations de réforme

- Un mandataire doit être: mentalement apte et majeur, le Curateur public (Public Trustee) ou une institution financière soumise au contrôle du gouvernement. Le mandataire ne peut être un failli non libéré.

- Le mandant devrait pouvoir nommer plusieurs mandataires pour agir en son nom. Il devrait aussi pouvoir nommer des mandataires successifs. Lorsque plusieurs mandataires sont nommés, le libellé de la procuration perpétuelle devrait indiquer s'ils agissent conjointement ou successivement.

- Dans le cas où le mandant serait apte mais est incapable de lire ou d'apposer sa signature à une procuration perpétuelle, une personne autre que le mandataire ou que le conjoint du mandataire, devrait pouvoir signer au nom du mandant. La procuration perpétuelle doit être signée en présence du mandant, suivant ses instructions et en

présence aussi de deux témoins présents en même temps.

- Une consultation juridique ne devrait pas être requise pour qu'une procuration perpétuelle soit valide.

- L'enregistrement des procurations perpétuelles ne devrait pas être obligatoire.

- La législation relative aux procurations perpétuelles devrait traiter expressément des procurations contingentes. Lorsque l'entrée en vigueur d'une procuration perpétuelle est déclenchée par l'inaptitude du mandant, ce dernier devrait pouvoir désigner une personne qui déterminera si le mandant est inapte ou non. De plus, un médecin en exercice doit confirmer que le mandant est inapte. Si la procuration perpétuelle ne désigne par de personne devant déclarer l'inaptitude du mandant ou si la personne nommée refuse d'agir ou est incapable d'agir, des certificats de deux médecins en exercice seront requis afin de prouver l'inaptitude du mandant.

- Dans le cas où le mandant d'une procuration perpétuelle deviendrait inapte mentalement, le mandataire devrait avoir l'obligation d'agir s'il sait ou devrait raisonnablement savoir que le mandant est mentalement inapte et s'il a accepté la gestion des biens du mandant ou a conclu une entente avec le mandant à cet effet.

- La législation devrait permettre la divulgation aux personnes autorisées d'informations confidentielles concernant la santé mentale et générale du mandant aux fins limitées de déterminer si la contingence sous la forme de l'inaptitude mentale s'est produite.

- Dans le cas où une procuration prendrait fin ou serait invalide, le mandataire ne devrait pas être considéré responsable de ses actions posées en toute bonne foi si le mandataire ignorait que la procuration avait pris fin et n'avait pas de motifs raisonnables lui indiquant que ses responsabilités avaient pris fin.

- Le mandant devrait avoir le droit d'exiger que le mandataire rende compte à tout moment. Si le mandant est inapte mentalement, le mandataire devrait avoir l'obligation de rendre compte à la demande de la personne nommée à cet effet dans la procuration perpétuelle. Dans les cas où le mandant n'aurait nommé personne à cet effet, si la personne nommée est le mandataire ou son conjoint, ou si la personne nommée est décédée ou mentalement inapte, le mandataire devra rendre compte annuellement au parent le plus proche du mandant.

- Dans l'éventualité où les pouvoirs d'un mandataire en vertu d'une procuration perpétuelle auraient pris fin, les actes du mandataire devraient être valides et avoir force exécutoire en ce qui concerne les tiers qui ignoraient que les pouvoirs du mandataire avaient pris fin.

- Un mandataire devrait pouvoir se démettre de ses fonctions en donnant un avis au mandant. Dans le cas où le mandant deviendrait mentalement inapte et que le mandataire avait assumé la gestion des biens du mandant ou avait conclu une entente à cet effet avec le mandant, le mandataire doit faire une demande devant les tribunaux afin d'être démis de sa fonction.

- Une procuration perpétuelle devrait prendre fin si elle est révoquée par le mandant ou si le mandant décède, par la faillite, le décès ou l'inaptitude mentale du mandataire, par la démission du mandataire, par l'écoulement d'une période de temps spécifiée dans la procuration perpétuelle ou par la nomination d'un gardien en vertu de la *Loi sur les personnes inaptes*.

- La législation sur les procurations perpétuelles devrait prévoir qu'un mandataire désirant se démettre de ses fonctions doit donner un avis au mandant.

- Les tribunaux devraient continuer à pouvoir remplacer un mandataire sur demande d'un proche parent, d'un mandataire ou d'un mandataire substitut lorsqu'un tel mandataire a été désigné par le mandant. La substitution ne devrait être permise que lorsque le mandant a spécifiquement nommé un mandataire substitut.

IAPJIW LAWYEREWIKTMUEMK NOPA SKO'SIA

SUMMARY*

Nipniku's 1997 ek, Lawreform kmisn ujit Nopa Sko'sia poqji minuaptikis tplutaqn nutjo't enduring powers of attorney (EPAs). Nopa Sko'sia Kekkunk Powers of Attorney Act, Kmisn panuijqatkis nikey tan tel pukuik tplutaqn mu e'tasianuk. Kutey Nike, mu tepianuk etek ujit kisi naqa'luksin mimajuinu mu kumutman tan wenl ikalitipnn mali aptmakun wtmotaqn. Aq tikit, Lejisle'sn mu ika'tuk tele'k EPAs-l kpkutluktita. Kmisn kisi te't tan tli apoqnmuata mimajuinu ta'ni kwilutmitijl EPAsl me aji ikaluksinew aq a't tlian tan tel pewatmitij.

Apjiw tel lukwek (Powers of attorney generally)

Power of Attorney na li'kl takument tan asite'taqn iknmuaj mimajuinul kisna kompani'l maliaptmakun wtmotaqn. Mimajuinu mesnik asite'taqn telui'tut "Attorni". Mimajuinu iknemuetoq asite'taqn telui'tut "Donor". Tapuamu'kl powers of attornil: Jenerl aq Limited Power. Jenerl Power of Attorni asite't tampasik kis tla'tuan (Donoral) wtmotaqn. Limited Power me kelu'lk, mita pasik kis tla'teket "Attorni", tan kiaskiw telimuj, donor vikka`snewij, kesnukwaj kisna mu kisi i'muk. Kommon la'iktuk, Power of Attorni simtuk kaqiaq neplij kisna pankraptewilij donoral. Amatpiej Donor elt nate'l etl kaqiaq power of attorni. Power of Attorni muasima tel wula'sitnuk maliaptasitn wtmutaqn donor apj me awnasiej. Siawiw na wet tla'sik, EPAs, powers of attorni tan "endurewik" tlia' donor amatpa'j. Kisi nenwite'tasik msit Kane'tian Proveinsl.

Eskipesik powers of attorni (Contingent powers of attorney)

Suel msit kanatawe'l provinsl tan asite'tmitij EPAs nespiw ankite'tmitij tlian na wula Power of Attorni pas lukwetow nataliaq wejkwataqanik. Ula nenqanmuaj attornal natalatekelin misoqo nataliaq wejkwataqanik. Power of attorni nuku teluemk "eskipesik" (contingent) misoqo nataliaq wejwataqanik. Tan maw tliaq koqowey, kisna kntinjinsi, ewi'tasik ula powers of attorni na mu koqajitasik donor. L'pa na EPA tl'ten eskipesik, na nuku tl wikasis miamuj eskipesik. Muta mu tl wikasinew na simtuk EPA poqji lukek teli nqase'k singewatasik.

Ilekemkewey Wikatikn (The Discussion Paper)

Nipniku's 1998 ek, Kmisn publishewa'toqsip Ilutekemkewey wikatikn, Enduring Powers of Attorney ula Nopa Sko'sia. Wiaqteksip tan ketu tlataqaniktuk, Ilutekemkewey wikatikniktuk a tepawtiss mimajuinu tan kwilut EPA kisi wi'tan ketuitl tesilij attornia luko'wkn. Telutasiksip EPA lejisle'sn pasik eywasin contingent Powers of Attorni, aq mu lukwetn misoqo nataliaq. Discussion paper nespiw telutkiss tan tle'tew pqutlukwetew. Attorni tan kis pukualut EPA-

* Mi'kmaw translation by: Katherine Sorbey, Listuguj, Quebec

iktuk. Ap kt+k ilutaqn na a EPA mena'lus kisna EPA invalidewik, Attorni ma kisi l'sutmuat koqowey oplasik, mu kjijituk mena'lus kisna EPA mu nuku kekkunmuk. Discussion paper wikutkiss klusuaqn ujit Certificate of Independent Legal advice nuta'tn ujit EPA validewin.

Kaqi iloqaptmi'tij tan te'sik mesnmi'tij wtmotaqn ujit discussion paper, kmisn kisi kiskaja'toq ula final report.

Ilsutaqnn Ujit iljoqataqnn (Recommendations for reform)

- Miamuj te'pipuna't aq Koqajatpat attorni, public trustee, kisna kaplnulewiktuk wetaqnewasik financial institution. Attorni mu piam kumuk panakruptsi.

- Donor tepawtiss kis lukowkn tan pasik te'siliji attornia. Me aq nkutejij attorni, tepawtiss wikasin EPA-iktuk ktqulukweno kisna tepkis lukweno.

- Donor koqajatpat pas mu nata'kilje'k aq mu nata signewa'tuk EPA, kis signewa'tekewis natuenl pilue'l, pasik mu attornial kisna attorni wtepiteml. EPA miamuj signewa'tasik donor eykk, donor telsutekej aq witnesse-- wa'tasik.

- Mandatory legal advice mu nuta'nuiss ujit EPA validewin.

- Registration ujit EPAs mu nutanus mandatoriewin.

- EPA lejisletion pas maliaptiss Contigent Powers of Attorni. Elpa na EPA skipesin misoqo donoral awnasielin, donor tepawtiss kis wi'tan wenl tan kistluwelital telekip kontinjensi kisa'tasikek. Aq ula mimajuinu kis wi'tut, nekem elt kis tluwen donor amatpiet, aq donor wtmalpalewiteml msaqn wi'kmlin amatpa't donor. Mu EPA wi'taq wenl tan tluwelital donoral tetutaskmalij, kisna tan kis wi'tup mu ketu ikalsi, na nuku - nuta'tiss tapusijik malpalewitewe`k. wikatiknk tan provewitij kontinjensi kisatasikip.

- Donor EPA-aq amatpiej, teltek attorni kjijian amatpielitl, aq siawi maliaptmuan wtmotaqn.

- Legislesion tepawtiss asite'tmin sea'tasin confidential information tan teli pne'lij donoral klaman kjijitasitow kontinjensi ujit eluwewiemkewey kis tliaq.

- Elpa na EPA naqatasiksip kisna mu validewinuk, tepawtiss na attorni mu l'su'tmuksin tan teli oplasik koqowey.

- Donor kisi kwilutss accounting tan patujiw. Aq donor mu koqajatpaq, attorni miamuj accounting muska'tuaj mimajuinul ewi'tasilitl EPA-iktuk. Donor mu ikalaq wenl, attorni miamuj accounting muska'tuaj te's newti punqik tan donor maw kikj jakumatl.

- Elpa na attorni authorityim EPA iktuk kaqiaq, Attorni's act tepawtiss validewin aq bindingewin aq kisi ew'asitn matnut mimajuinu tan ketu ika'lsit, toqo kaqiaqip EPA.

- Attorni kinuatuas donoral ketu punlukwet. Donor mu koqajatpaq, attorni miamuj kouktiktuk applyewis tan tl punlukwetow.

- EPA tl kaqias donor tluwej kisna donor npikk. EPA tl kaqias attorni pankruptewij, attorni amatpiej kisna npikk; mina'lsis attorni; kisna teliaq tan tel msaqn wikasik EPA-iktuk; kisna kaqmalut guardian wejatekemk Incompetent Persons Ackiktuk.

- EPA legisle'sn tepawtiss tl-ten miamuj donor kinuatuan attornial ketu punajo't EPA.

- Kourtl tepawtiss siawi authorisewin mina'lanew attornial tan tijiw application piskwa'toq, kisna wejiaq maw kikjakumatl donoral, kisna attorni applyewij, kisna alternate, tan donor e'wi'tapnn alternate attornial. Substitution pas lukwis tan donor ewi'tapnn alternate attornial.

I INTRODUCTION

1. The project

In September 1993, the Law Reform Commission of Nova Scotia released a Discussion Paper which considered the law relating to adult guardianship in Nova Scotia.[1] The Commission recommended numerous changes to the way guardians are appointed for people found by the courts to be mentally incompetent.[2] A "guardian of the estate" is a person appointed by the court to handle an adult's financial affairs. A "guardian of the person" is a person appointed by the court to look after an adult's personal affairs. During consultations on the adult guardianship project, the Commission concluded that guardianship of adults should only be used after all other alternatives have been tried. It was clear that better alternatives were needed to avoid court applications for guardianship.

The Commission went on to study alternatives to "guardianship of the person". In November 1994, the Commission released a Discussion Paper on living wills. The Commission suggested reform to the law which allows a person to make personal and health care decisions on another person's behalf when that other person is no longer able to do so.[3] The Commission did not, however, consider alternatives to "guardianship of the estate" as a separate project area. This was partly because Nova Scotia already had a *Powers of Attorney Act*[4] which allows for enduring powers of attorney. A power of attorney is a legal document in which a person (the "donor") gives authority to another person or company (the "attorney") to act on the donor's behalf. The attorney is usually given authority to deal with or dispose of the donor's property. A power of attorney does not deal with health care issues. Unlike other types of powers of attorney, an enduring power of attorney continues to be effective after the onset of mental incompetence on the part of the donor.

Since 1994, the Commission has learned of concerns regarding enduring powers of attorney. For example, there are concerns that the current statute lacks adequate procedural safeguards

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[1] Law Reform Commission of Nova Scotia, *Adult Guardianship in Nova Scotia: Suggestions for Reform of the Incompetent Persons Act* (Discussion Paper) (Halifax: Law Reform Commission of Nova Scotia, 1993).

[2] For the most part, this Report uses the terms "mental incompetence" and "mentally incompetent" when describing an adult not capable of decision-making. To reflect language used in powers of attorney legislation and certain publications, on occasion this Report uses the terms "mental incapacity" or "mentally incapable" to describe the same concepts.

[3] Law Reform Commission of Nova Scotia, *Living Wills in Nova Scotia* (Discussion Paper) (Halifax: Law Reform Commission of Nova Scotia, November 1994) [hereinafter *Living Wills in Nova Scotia*]; and Law Reform Commission of Nova Scotia, *Adult Guardianship and Personal Health Care Decisions* (Final Report) (Halifax: Law Reform Commission of Nova Scotia, 1995) [hereinafter *Adult Guardianship and Personal Health Care Decisions*].

[4] R.S.N.S. 1989, c. 17.

to prevent financial abuse of people who appoint someone to make financial decisions on their behalf. People may have questions about when enduring powers of attorney come into effect. They may also wonder whether enduring powers of attorney are legally valid documents. As a result of these concerns, in June 1997 the Commission began to study the law relating to enduring powers of attorney. To help identify relevant issues, the Commission formed an Advisory Group, comprised of people with particular knowledge or concerns relating to enduring powers of attorney. The names of Advisory Group members are found at Appendix B. The Commission is grateful for the contributions of these people. The Commission concluded that the current legislation fails to address certain concerns that have been raised. In June 1998, the Commission published a Discussion Paper on enduring powers of attorney.[5] The Discussion Paper suggested safeguards to protect people giving enduring powers of attorney and proposed ways in which the law could be changed to ensure that the wishes of those people could be implemented more effectively.

Among its suggestions, the Discussion Paper proposed that a person giving an enduring power of attorney (the donor) should be able to name any number of attorneys to act on his or her behalf. It was suggested that enduring powers of attorney legislation should deal specifically with contingent powers of attorney, those which do not take effect until a particular event has occurred. The Discussion Paper also suggested when a duty to act should be imposed on an attorney appointed under an enduring power of attorney. If the donor becomes mentally incompetent, the attorney would have a duty to act if he or she knew or ought reasonably to know that the donor was mentally incompetent, and if the attorney had assumed management of the estate or contracted with the donor to do so. Another suggestion was that in the event of an enduring power which had been terminated or was invalid, an attorney would be protected from liability for having acted in good faith if he or she did not know and had no reasonable grounds for believing that his or her authority had been terminated or lost. In addition, the Discussion Paper invited comment on whether a Certificate of Independent Legal Advice should be required in order for an enduring power of attorney to be valid. The Certificate of Independent Legal Advice would contain a statement that the donor signed (or acknowledged having signed) the enduring power of attorney in the presence of a lawyer, that the donor acknowledged that the enduring power was voluntarily signed, and that the donor appeared to understand the nature and effect of the document.

The Commission received a number of written responses to the Discussion Paper. In addition, comments on the Discussion Paper were provided by telephone and at a number of meetings. A list of those persons who commented on the Discussion Paper is provided at Appendix B. The Commission is grateful to the commentators for their remarks.

The overall response of commentators to the Discussion Paper suggestions was favourable,

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[5] Law Reform Commission of Nova Scotia, *Enduring Powers of Attorney in Nova Scotia* (Discussion Paper) (Halifax: Law Reform Commission of Nova Scotia, 1998) [hereinafter the Discussion Paper].

with most disagreement or concerns being confined to a small number of issues. Having taken into account all comments received, and where appropriate, having completed additional research, the Commission has prepared this Final Report.

2. Legal language

This Report attempts to present legal information as clearly as possible so that people who do not have legal training can understand the Commission's recommendations for reform. There are still some situations where the language relates to specific legal and technical concepts and the words used will not be familiar to everyone. This section provides definitions of such words used in this Report.

Act - Law made by elected members of government. Also referred to as "statute" or "legislation".

Adult guardianship - The law relating to the appointment of guardians to make another person's decisions, either financial, personal or both.

Advance health care directive - A legal document in which a person sets out how his or her health care is to be managed in the event of that person's incapacity. The person may appoint someone to make health care decisions for him or her (i.e., a proxy) and/or set out specific instructions or general principles about how his or her health care is to be managed.

Affidavit - A written statement made by a person who signs and either swears to or affirms the truthfulness of the statements made.

Attorney - A person or company who is given authority to act on behalf of another person under a power of attorney.

Common law - Law developed over the years by judges when making decisions in court. These decisions are relied upon by other judges in making decisions in other cases.

Common law relationship - A spousal type relationship between two people who did not go through a legally recognized form of marriage.

Deed - A document which transfers title to land.

Donor - A person who grants authority to another person or company to act on his or her behalf under a power of attorney.

Enduring power of attorney - A power of attorney which "endures" or continues to be effective beyond the onset of mental incompetence on the part of the donor. See also "power of attorney".

Estate - Everything a person owns at the time of his or her death or incompetence.

Execute - The process of signing a legal document such as a power of attorney.

Legislation - Law made by elected members of government. Also referred to as "statute" or "act".

Living will - A type of advance health care directive in which a person sets out specific instructions or general principles about how his or her health care is to be handled in the event of the person's incapacity. See also "advance health care directive".

Power of attorney - A legal document in which a person ("donor") gives authority to another person or company ("attorney") to act on the donor's behalf. The attorney is usually given authority to deal with or dispose of the donor's property. A power of attorney does not deal with health care issues. See also "advance health care directive".

Public Trustee - A government office that may be appointed to, among other matters, act as a guardian of an adult who is found to be mentally incompetent.

Statute - Law made by elected members of government. Also referred to as "legislation" or "act".

II GENERAL INFORMATION

1. Powers of attorney

A power of attorney is a legal document that authorizes a person or company to act on another person's behalf to deal with or dispose of that other person's property. The person receiving the power is called the "attorney"[6] and the person granting the power is called the "donor". Powers of attorney may be general or limited. A general power of attorney can be all-encompassing and can allow the attorney to make virtually any type of decision relating to the donor's property.[7] A limited power of attorney is more restricted. It is usually used to complete a specific financial transaction when a person is on vacation, is ill or is otherwise unable to attend in person. It may be limited to a specific period of time or to the type of power it gives the attorney.

Powers of attorney are governed by the common law of agency, and the relationship is that of a principal and agent. The principal (donor) appoints the agent (attorney) to act on the principal's behalf, specifying what may or may not be done by the agent. An attorney, as the donor's agent, is viewed as having a fiduciary duty to the donor. This means that the attorney must act only in the best interests of the donor. An attorney is prevented from using the donor's property for his or her own benefit and must resolve conflicts of interest in favour of the donor.[8] An attorney must also exercise diligence and prudence in the management of the donor's property.

A power of attorney ordinarily comes into effect as soon as it is executed, namely when set out in writing and signed by the donor.[9]

2. Ending a power of attorney

A donor can terminate a power of attorney by notifying the attorney that his or her powers are revoked. The attorney can also terminate a power of attorney by renouncing his or her position as attorney.[10] At common law, a power of attorney automatically terminates on the

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[6] An "attorney" need not be a lawyer.

[7] It does not, however, permit the attorney to make a will on behalf of the donor.

[8] Manitoba Law Reform Commission, *Enduring and Springing Powers of Attorney* (Report No. 83) (Winnipeg: Manitoba Law Reform Commission, 1994) [hereinafter Manitoba Report] at 1.

[9] Manitoba Report, note 8, above, at 38. An exception is the contingent power of attorney, discussed below in Part II.4.

[10] An attorney renounces his or her appointment by notifying the donor.

death or bankruptcy of the donor.[11] Thus, unlike a will, which takes effect on death, a power of attorney can only be used during the donor's lifetime, because it terminates on the donor's death. At common law, the mental incompetence of the donor also ends the power of attorney.[12] As a result, at common law there is no concept of an "enduring" power of attorney which continues to operate after onset of the donor's mental incompetence.[13] This is a significant deficiency, since people may wish to plan for their potential incompetence by providing for a power of attorney to operate when they are unable to make their own decisions. All provincial legislatures responded to this gap in the common law by amending their laws to allow for "enduring powers of attorney", which operate or "endure" despite the donor's mental incompetence. An enduring power of attorney takes effect as soon as it is signed and witnessed unless it states otherwise. If the donor states that the attorney may not act unless the donor becomes mentally incompetent, this is considered to be a "contingent" enduring power of attorney.[14] In this Report, an enduring power of attorney will be referred to as an "EPA".

3. Planning for incompetence

Most people are aware of the importance of estate planning, including the drafting of a will.[15] The need to consider who will manage a person's affairs in the event of his or her mental incompetence is also an integral part of estate planning. An EPA allows for continued management of a person's assets during incompetence. An advance health care directive allows for the continued management of a person's personal health and well-being during incompetence. If a person does not have either of these documents, he or she may be risking an expensive, time-consuming and stigmatizing application for the appointment of a guardian under Nova Scotia's *Incompetent Persons Act*.[16]

The issue of advance health care directives has been dealt with extensively by the Commission

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[11] The only exception is an irrevocable power of attorney, one expressed to be irrevocable and given to secure a proprietary or other interest of the attorney; see *Wilkinson* v. *Young* (1992), 25 D.L.R. (3d) 275 (Ont. H.C.).

[12] *Drew* v. *Nunn* (1879), 4 Q.B.D. 661; *Yonge* v. *Toynbee*, [1910] 1 K.B. 215.

[13] The law, however, does recognize powers of attorney for physically incapable donors, such as the elderly, who may find it difficult to leave their homes in order to do such tasks as banking or paying bills.

[14] Discussed in Part II.4, below.

[15] A national survey by Decima Research, however, found that 48.7% of Canadian adults have no will, and 52.9% have not done any estate planning; see "The Need for Estate Planning" (1998) 39 Will Power at 8 (Newsletter of CCH Canadian Limited).

[16] R.S.N.S. 1989, c. 227.

in earlier reports.[17] The rest of this Report will deal with EPAs as an approach to planning for mental incompetence.[18]

An EPA is a power of attorney which continues to have effect, or endure, despite the onset of mental incompetence and the donor's consequent inability to direct, monitor, and supervise the actions of the attorney. It will remain in effect if, at the time it is signed, it contains a statement that the attorney should continue to act despite the incompetence of the donor.[19]

Every province in Canada now recognizes EPAs.[20] Much of the legislation, such as that in Nova Scotia, is similar to the *Uniform Powers of Attorney Act* adopted by the Uniform Law Conference of Canada (U.L.C.C.) in 1978.[21] This EPA legislation contains few formalities and safeguards and is very brief. Nova Scotia's *Powers of Attorney Act*, for example, is only three pages long and does little more than validate the use of EPAs.

Section 3 of the Nova Scotia *Act* states:

> *A power of attorney, signed by the donor and witnessed by a person who is not the attorney or the spouse of the attorney, that contains a provision expressly stating that it may be exercised during any legal incapacity of the donor, is*
>
> *(a) an enduring power of attorney;*
>
> *(b) not terminated or invalidated by reason only of legal*

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[17] *Living Wills in Nova Scotia*; *Adult Guardianship and Personal Health Care Decisions*, note 3, above.

[18] Other alternatives for incompetence planning, such as the appointment of a guardian, the use of trusts, agency arrangements, gifting, joint property, bank powers of attorney, as well as appointing a representative payee under federal legislation, will not be considered in any detail in this Report. For a review of these useful but limited approaches to incompetence planning see D.C. Simmonds, "Planning for Incapacity" 27 Estates and Trusts Reports 116 at 118-126.

[19] R.M. Gordon and S.N. Verdun-Jones, *Adult Guardianship in Canada* (Carswell: Toronto, 1992) at 3-114.

[20] Alberta, *Powers of Attorney Act*, S.A. 1991, c. P-13.5 and *Personal Directives Act*, S.A. 1996, c. P-4.03, as am. by S.A. 1997, c. 18; British Columbia, *Power of Attorney Act*, R.S.B.C. 1979, c. 334; Manitoba, *Powers of Attorney and Mental Health Amendment Act*, S.M. 1996, c. 62; New Brunswick, *Property Act*, R.S.N.B. 1973, c. P-19; Newfoundland, *Enduring Powers of Attorney Act*, R.S.N. 1990, c. E-11; Nova Scotia, *Powers of Attorney Act*, R.S.N.S. 1989, c. 17; Ontario, *Substitute Decisions Act, 1992*, S.O. 1992, c. 30; Prince Edward Island, *Powers of Attorney Act*, R.S.P.E.I. 1988, c. P-16; Quebec, Art. 2130-2185 C.C.Q. (*Civil Code of Quebec*) and Saskatchewan, *Powers of Attorney Act*, S.S. 1996, c. P-20.2.

[21] Uniform Law Conference of Canada, *Proceedings of the Sixtieth Annual Meeting*, Appendix O (St. John's, Nfld, August 1978) at 233.

incapacity that would, but for this Act, terminate or invalidate the power of attorney; and

(c) valid and effectual,

subject to any conditions and restrictions contained therein that are not inconsistent with this Act.

Until May 25, 1988, when the *Powers of Attorney Act* came into effect, any power of attorney made in Nova Scotia became void upon the onset of the donor's incompetence. As a result, any power of attorney executed in Nova Scotia prior to May 25, 1988 is not enduring and should not be relied upon in the event of the donor's incompetence.

The mental competence required to be a donor of an EPA includes the ability to understand:

- the nature and extent of his or her property and financial affairs;
- that the attorney may exercise all the powers in the lifetime of the donor that the donor can himself or herself exercise with respect to the matters set forth in the document, unless and until the document is revoked;
- that the all-embracing terms of the document give the attorney the power to deal with everything the donor owns; and
- that the donor will lose the right to revoke the document in the event that he or she becomes mentally incompetent, and that it will likely remain in effect until the donor's death.[22]

Most provinces, including Nova Scotia, do not require registration of an EPA with a Public Trustee or other government office or agency. There is thus no formal system for the monitoring or supervision of an attorney who is acting for a mentally incompetent person. Most provinces, however, as does Nova Scotia, provide for an interested party to apply to court to require an attorney to submit his or her accounts to the court for review and approval.

4. Contingent powers of attorney

Most Canadian legislation which allows an EPA to endure despite the onset of a person's mental incompetence also contemplates the possibility that it will come into effect only upon a future contingency, most often the donor's mental incompetence. This means that the attorney cannot act until the future event occurs.[23] This must be explicitly stated in the EPA. If it is

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[22] *Godelie* v. *Public Trustee* (1990), [1991] 39 E.T.R. 40 (Ont. Dist. Ct.); see also *Re K, Re F*, [1988] 1 All E.R. 358 (Ch. D.).

[23] Some jurisdictions refer to these as "springing" powers of attorney; see *e.g.* Manitoba Report, note 8, above, at 4.

not explicitly stated, the EPA takes effect from the moment it is executed.

There appears to be a certain amount of confusion among lawyers with respect to contingent powers of attorney, which seem to be used primarily by trust companies. In Nova Scotia, the legal validity of contingent powers of attorney has been questioned, because the *Powers of Attorney Act* contains no specific provisions allowing them.[24] Neither, however, are they prohibited. It is therefore unclear whether a Nova Scotia court would recognize them. The issue of the validity of contingent EPAs is one of the central issues in this Paper. The Commission takes the position that contingent EPAs should be expressly recognized and provided for in the legislation.[25] This is discussed at length below in Part III.7.

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[24] See W. Ripley, "Practical Estate Planning Options for Non-Traditional Couples" (Paper presented to the Seventh Annual CBA - Nova Scotia Professional Development Conference, 30 January 1998) [unpublished] at 11. For an opposing view see R.J. Clarke, "Advising the Elderly and Their Families" (Paper presented to the Fourth Annual CBA - Nova Scotia Professional Development Conference, 28 April 1995) [unpublished] at 63.

[25] Given the number of recommendations in this Report, as well as the relative brevity of the current Nova Scotia *Act*, it would be simpler for the Report's recommendations to be implemented through a new statute, rather than through amendments to the existing one.

III RECOMMENDATIONS FOR REFORM

Making an EPA

1. Choosing an attorney

The choice of whom to appoint as attorney, particularly for an EPA, is a very important one. The person must be trustworthy, ethical and competent. In practice, attorneys are adults, trust companies or the Public Trustee. The common law suggests, however, that any mentally competent person, even a child, can act as an attorney.[26] This has not been altered by the Nova Scotia legislation, which does not contain any restrictions on who can be an attorney.[27] In the Discussion Paper, the Commission took the position that a person should be an adult in order to act as an attorney. This is consistent with the approach taken by many provinces that have recently revised their EPA legislation. Ontario's *Substitute Decisions Act, 1992*[28] requires that a person be at least 18 years old to act as an attorney. It also permits the Public Guardian Trustee (PGT) to act if it agrees to do so.[29] In Newfoundland, an attorney must be 19 years of age.[30] Similarly, the Alberta legislation requires that an attorney be an adult at the time the EPA is executed.[31] In Manitoba, the attorney must be an adult and mentally competent and not an undischarged bankrupt.[32] Under the legislation pending in British Columbia,[33] the attorney must be an adult, the Public Trustee, or a credit union or trust company.

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[26] J. Frankovic *et.al.*, *Canadian Estate Administration Guide* (North York: CCH Canada Limited, 1996) vol. 1 at 20,005.

[27] Neither does the U.L.C.C. draft *Act*, note 21, above, or legislation in Saskatchewan, New Brunswick, and Prince Edward Island, note 20, above.

[28] S.O. 1992, c. 30.

[29] Note 28, above, s. 7(3).

[30] Note 20, above, s. 3(2).

[31] The Alberta Law Reform Institute did not endorse an age restriction, nor did it agree that mental incapacity or bankruptcy should disqualify someone from acting as an attorney, although both would cause the EPA to terminate. See Alberta Law Reform Institute, *Enduring Powers of Attorney* (Report for Discussion No. 7) (Edmonton: Alberta Law Reform Institute, 1990) [hereinafter Alberta Report for Discussion] at 60-61.

[32] *Powers of Attorney and Mental Health Amendment Act*, S.M. 1996, c. 62.

[33] British Columbia's *Representation Agreement Act*, R.S.B.C. 1993, c. 67 will come into effect in 2000. The *Powers of Attorney Act*, R.S.B.C. 1979, c. 334, is the law at present. Under the new legislation, EPAs are replaced with "representation agreements" which combine elements of EPAs and advance health care directives. The new *Act* refers to those people appointed under a representation agreement as "representatives", rather than as "attorneys".

At common law a grant of attorneyship to an incompetent person is invalid.[34] The Discussion Paper suggested that the legislation should specifically state that an attorney must be mentally competent. This would make it clear that the EPA terminates when an attorney becomes incompetent. The Public Trustee in Nova Scotia is given authority in the *Public Trustee Act*[35] to act as an attorney. The Discussion Paper also suggested that this authority be mentioned in the EPA legislation, as it should make people more aware of the Public Trustee's office. In addition, the Discussion Paper suggested that a financial institution be specified as capable of serving as an attorney.

In the Discussion Paper, the Commission expressed concern about allowing undischarged bankrupts to deal with trust funds. It was suggested that a bankrupt attorney might find it irresistible to improve his or her position through unauthorized use of the donor's assets. The Commission therefore suggested that an attorney should not be an undischarged bankrupt.

The Commission did not receive any comments which disagreed with the suggestions on this issue in the Discussion Paper. One commentator did propose that the term "financial institution" be made more specific, either by defining the amount of capital required or the nature of a financial institution's links to Nova Scotia. The commentator suggested that a more specific definition would prevent undercapitalized financial institutions, or those lacking a significant presence in Nova Scotia, from being appointed as an attorney. The Commission is of the view that the amount of required capital and other factors necessary for a financial institution to serve as an attorney in Nova Scotia are more properly matters of policy, to be determined by the government. The Commission does not advocate that financial institutions might serve as attorneys if they are not qualified to conduct business in Nova Scotia. To make this clear, the Commission recommends that the term "financial institution" should be changed to "government-regulated financial institution." As a result, in addition to affirming its Discussion Paper suggestions on this Issue, the Commission recommends that a government-regulated financial institution be able to serve as an attorney.

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[34] F.M.B. Reynolds, *Bowstead on Agency*, 15th ed. (London: Sweet & Maxwell, 1985) [hereinafter *Bowstead on Agency*] at 33.

[35] R.S.N.S. 1989, c. 379.

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The Commission recommends that:

- **An attorney must be:**
  - **mentally competent and of the age of majority (presently 19 years of age),**
  - **the Public Trustee, or**
  - **a government-regulated financial institution.**

- **An attorney must not be an undischarged bankrupt.**

2. Joint and alternate attorneys

Nova Scotia's *Powers of Attorney Act* refers to "an" attorney. This would seem to preclude joint attorneys. The *Interpretation Act*,[36] however, states that the singular includes the plural and vice versa. The *Powers of Attorney Act* can therefore be construed as allowing more than one attorney. This is consistent with the common law, which permits a donor to appoint more than one attorney. Also, at common law, unless the donor has indicated otherwise in the EPA, multiple attorneys must act jointly, meaning that they must reach unanimous agreement before they can take any action.[37] If one of the attorneys is unable or unwilling to continue to act, the attorneyship ends.[38]

Ontario's legislation allows for multiple attorneys and indicates that if two or more people are named as attorneys, they shall act jointly, unless the power of attorney states otherwise.[39] The Alberta legislation allows for the appointment of joint or alternate attorneys. If alternate attorneys are appointed, the appointment of one attorney is conditional on the ending of the appointment of the other.[40] In Manitoba, a donor may appoint any number of persons to act jointly or successively. If appointed successively, attorneys are to act in the order in which they are named in the document. Unlike Alberta and Ontario, however, if an EPA in Manitoba fails to indicate whether the attorneys are acting jointly or successively, they must act successively. Rather than requiring unanimity in the event of multiple attorneys, the

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[36] R.S.N.S. 1989, c. 235, s. 19(i).

[37] *Bowstead on Agency*, note 34, above, at 49.

[38] Manitoba Report, note 8, above, at 2.

[39] Note 28, above, s. 7(4).

[40] *Powers of Attorney Act*, S.A. 1991, c. P-13.5, s. 13(2).

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Manitoba legislation requires a simple majority unless the EPA states otherwise.[41]

In the Discussion Paper, the Commission suggested that people should be allowed to name any number of attorneys to act on their behalf. The Commission suggested that many people, especially if they are naming a child as attorney, would find it hard to choose only one attorney. Since courts are prepared to grant co-guardianship under the *Incompetent Persons Act*,[42] the Commission reasoned, EPAs should not be more restrictive. The Commission also suggested that if an EPA names multiple attorneys, they should be deemed to act jointly, and therefore must make decisions unanimously, unless the EPA states that decisions shall be made by majority agreement. Furthermore, the Commission suggested that a donor should be able to appoint alternate attorneys to act successively.

The Commission received differing comments on whether more than one attorney should be required to act jointly or successively. Since the issuance of the Discussion Paper, the Commission has reconsidered this issue at length. Where joint attorneys are involved, achieving the required unanimity among the attorneys might prove difficult. This might mean that implementing the donor's wishes is delayed or not done at all. The Commission does not consider it appropriate to require that where an EPA provides for multiple attorneys, this will be treated as meaning joint attorneys, unless the EPA explicitly states otherwise. To help avoid this potential problem and to provide donors with as much freedom as possible in the creation of EPAs, the Commission takes the position that if more than one attorney is named, whether they are to act jointly or successively should depend on the language used in the EPA. The common law, under which multiple attorneys are treated as joint, should only be applied if the EPA is silent on this issue. The Commission also affirms its other suggestions about donors being able to appoint multiple and alternate attorneys.

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- A donor should be able to name any number of attorneys to act on his or her behalf.
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- If more than one attorney is named, whether they are to act jointly or successively will depend on the language used in the EPA. The common law, under which multiple attorneys are treated as joint, should only be applied if the EPA is silent on this issue.

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[41] Note 32, above, s. 18.

[42] R.S.N.S. 1989, c. 218.

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[41] Note 32, above, s. 18.

[42] R.S.N.S. 1989, c. 218.

3. *Signing on behalf of the donor*

Some donors may not be physically able to sign documents. Other donors may be without sight or may not be able to read. In such cases, the legislation in some provinces expressly allows an EPA to be signed by someone other than the donor, provided he or she signs in the presence of and under the direction of the donor. An example is New Brunswick's *Property Act*.[43] In order to limit the risk of abuse, Alberta legislation permits a person to sign for the donor only where the donor is physically incapable of signing the EPA.[44] Manitoba, on the other hand, has a special provision allowing an individual other than the attorney or the attorney's spouse to sign on the donor's behalf where a donor is "incapable of reading or signing an EPA".[45] The Nova Scotia statute is silent on this issue.

In the Discussion Paper, this Commission preferred the Manitoba approach. If a donor is blind, illiterate, or physically incapable of signing his or her own EPA, the Commission suggested, someone else should be able to sign it on the donor's behalf. The Commission also suggested, in order to prevent abuse, requiring that an EPA be signed in the donor's presence, at the donor's direction and in the presence of two or more witnesses who are present at the same time.[46]

In addition, the Discussion Paper suggested that the person signing on behalf of the donor should not be the attorney or the attorney's spouse. Consistent with recommendations in other Commission reports, it was also suggested that "spouse" should include common law spouses, whether of the same or opposite sex.[47]

There was general agreement with the Discussion Paper's suggestions among those commentators who addressed the issue. Upon further reflection, the Commission is of the view that its suggestion about signing on behalf of the donor should be changed slightly, to make it clear that the Commission did not envisage a situation where the donor lacked mental competence. Apart from this clarification, the Commission affirms its Discussion Paper suggestions on this issue. Consequently, the Commission recommends that when the donor is mentally competent, but otherwise incapable of reading or signing an EPA, an individual

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[43] Note 20, above, s. 58.2(b).

[44] Note 40, above, s. 2(3). Similarly, British Columbia's *Representation Agreement Act*, note 33, above, s.13(4), allows for a person who is physically incapable of signing the agreement to have it signed by someone else.

[45] Note 32, above, s. 10(2).

[46] The protections are also found in the Nova Scotia *Wills Act*, R.S.N.S. 1989, c. 505, s. 6.

[47] For example, Law Reform Commission of Nova Scotia, *Probate Reform in Nova Scotia* (Final Report) (Halifax: Law Reform Commission of Nova Scotia, 1998) which at 51 defines spouse as, "a person of the same or opposite sex with whom the person has a close personal relationship that is of importance to both of them".

(other than the attorney or the attorney's spouse) should be able to sign it on the donor's behalf. The Commission recommends that the EPA be signed in the donor's presence, at the donor's direction and in the presence of two or more witnesses who are present at the same time. Moreover, the Commission recommends that "spouse" should be defined to include common-law spouse, whether of the same or opposite sex. This definition, the Commission agrees, should apply in all instances of EPAs where a spouse might be involved.

The Commission recommends that:

- **When the donor is mentally competent, but otherwise incapable of reading or signing an EPA, an individual (other than the attorney or the attorney's spouse) should be able to sign it on the donor's behalf. The EPA must be signed in the donor's presence, at the donor's direction and in the presence of two or more witnesses who are present at the same time.**

- **"Spouse" should be defined to include common law spouse, whether of the same or opposite sex. This definition should apply in all instances of EPAs where a spouse might be involved.**

4. Witnesses

The Nova Scotia *Powers of Attorney Act* requires that a power of attorney be witnessed by a person who is not the attorney or the spouse of the attorney.[48] Although at common law powers of attorney do not have to be witnessed,[49] every province now requires that the signing of an EPA be witnessed.[50]

The provincial statutes differ, however, with respect to who cannot witness an EPA and the number of witnesses that are required. Most EPA statutes contain fairly narrow restrictions on who cannot witness an EPA, and the attorney or the attorney's spouse are usually excluded from being witnesses. In New Brunswick, however, an EPA can be witnessed by any adult

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[48] Note 4, above, s. 3.

[49] Newfoundland Law Reform Commission, *Working Paper on Powers of Attorney* (St. John's: Newfoundland Law Reform Commission, 1987) [hereinafter Newfoundland Report] at 28.

[50] Alberta Report for Discussion, note 31, above, at 40, where the reasons for this requirement are outlined: "... [I]t (1) confirms the identity of the donor and the absence of physical duress, (2) minimizes the risk of forgery, (3) impresses upon the donor the seriousness of the proposed action, and (4) provides evidence of authenticity to third parties relying on the power of attorney."

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- When the donor is mentally competent, but otherwise incapable of reading or signing an EPA, an individual (other than the attorney or the attorney's spouse) should be able to sign it on the donor's behalf. The EPA must be signed in the donor's presence, at the donor's direction and in the presence of two or more witnesses who are present at the same time.

- "Spouse" should be defined to include common law spouse, whether of the same or opposite sex. This definition should apply in all instances of EPAs where a spouse might be involved.

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person "other than the donee" (i.e., other than the attorney).[51]

British Columbia's *Representation Agreement Act* is unusual in that the agreement must be executed in the presence of two witnesses as well as each attorney[52] named in the agreement.[53] Ontario legislation requires that an EPA be executed in the presence of two witnesses, and it also precludes certain categories of people from acting as witnesses. By requiring that witnesses be 18 years of age and not subject to a guardianship order, the Ontario legislation addresses the concern that witnesses be mentally competent to understand what they are doing. As well, the Ontario legislation excludes those with a very close relationship to the donor, such as the donor's spouse, partner or child, from acting as witnesses.[54] This is presumably to prevent those who may have a financial interest in the donor's estate from exerting undue influence on the donor.

The Alberta Law Reform Institute also recommended that those ineligible to act as witnesses include the attorney and the attorney's spouse.[55] While it did not favour further expanding the class of ineligible witnesses, it recommended that the EPA be witnessed by a lawyer who would sign a Certificate of Legal Advice.[56] The spouse of the lawyer who signs the Certificate of Legal Advice would also be excluded from being a witness to the EPA.

Manitoba legislation precludes the attorney and his or her spouse from acting as witnesses. This legislation is unique in requiring that a witness be included within a list of various categories of people.[57]

In the Discussion Paper, this Commission did not agree that the Manitoba approach would prevent the type of abuse with which the Commission was concerned. Such a provision, the Commission suggested, presumes that members of the specified categories are more trustworthy. In the Commission's view, requiring that an "authority figure" act as a witness would not necessarily make the document more reliable.

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[51] Note 20, above, s. 58.2 (c).

[52] It uses the word "representative" instead of attorney.

[53] Note 33, above, s. 13.

[54] Note 28, above, s. 10(2). The section is reproduced in the Discussion Paper at 14.

[55] Alberta Report for Discussion, note 31, above, at 42. The recommendation also took into account "common law" spouses.

[56] This was repealed on December 1, 1997 by the *Personal Directives Act*, S.A. 1996, c. P-4.03; the issue of mandatory legal advice will be discussed further below in Part III.5.

[57] Note 32, above, s. 11(1). The section is reproduced in the Discussion Paper at 15.

The Commission suggested instead that an attorney or an attorney's spouse should not be permitted to witness an EPA. The Commission also suggested that a witness should be a mentally competent adult, and that the donor's spouse or child should be precluded from witnessing an EPA.

Concerning the number of witnesses, the Discussion Paper preferred the Ontario approach, which requires two witnesses to an EPA.[58] The Commission suggested there is no sound reason to distinguish the requirements for executing an EPA from the requirements for executing a will. A will must be signed in the presence of two or more witnesses who are present at the same time. The Commission suggested that requiring two witnesses would help to impress the significance of an EPA upon the donor and the witnesses.

Those commentators who remarked on this issue were generally in agreement with the Commission's suggestions. One commentator suggested that a single witness should be sufficient. The Commission prefers a requirement for two witnesses, in particular to help make evident the importance of granting an EPA. Upon further reflection, however, the Commission agrees that the use of the term "child" in this context might lead to confusion. In relation to this issue, in suggesting who may serve as a witness, the Commission means a child who is of the age of maturity. The Commission agrees that the term "adult son or daughter" should be substituted for "child" here. As a result, the Commission recommends that an EPA should be witnessed by two people who are present at the same time, neither of whom is: the attorney or the attorney's spouse; the donor's spouse; an adult son or daughter of the donor, or an adult person whom the donor has demonstrated a settled intention to treat as his or her son or daughter; a person who is mentally incompetent; or a person who is less than the age of majority, presently 19 years of age.

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[58] The Australian Law Reform Commission also recommended that an EPA be executed in the presence of two independent witnesses. [Australian] Law Reform Commission, *Enduring Powers of Attorney* (Report No. 47) (Canberra: Australia Government Publishing Service, 1988) at 12.

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  1. The attorney or the attorney's spouse.
  2. The donor's spouse.
  3. An adult son or daughter of the donor, or an adult person whom the donor has demonstrated a settled intention to treat as his or her son or daughter.
  4. A person who is mentally incompetent.
  5. A person who is less than the age of majority, presently 19 years of age.

5. Mandatory legal advice

In preparing the Discussion Paper, the issue of whether or not a person making an EPA should be required to consult a lawyer was the most difficult one for the Commission. The Commission was concerned that requiring the use of a lawyer's services, because of the cost involved, might reduce access to EPAs. The Commission also acknowledged that this concern must be balanced with the importance of ensuring that people are fully informed as to the impact of signing an EPA, and that the EPA they are signing is valid and reflects their wishes. This is especially important, because an EPA may continue to operate long after the donor is mentally incompetent to change it. The only way of guaranteeing that a person has obtained legal advice is to require, by legislation, that a Certificate of Independent Legal Advice be attached to the EPA. This certificate is required by matrimonial property legislation in some provinces. Such legislation requires proof, before any settlement is confirmed or any agreement signed, that both spouses have received independent legal advice and are therefore informed as to their legal rights.

The Alberta Law Reform Institute recommended the use of a certificate and cited New South Wales, Australia, as the only other jurisdiction to have adopted this approach.[59] Until December 1997, the Alberta *Powers of Attorney Act* required that an EPA include a Certificate of Legal Advice signed by a lawyer who was not the attorney or the attorney's spouse.[60]

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[59] The *Conveyancing Act* 1919, as am. by the *Conveyancing (Powers of Attorney) Amendment Act* 1983, No. 26, s. 163F(2) provides that EPAs must be witnessed by a "prescribed person" (defined as a clerk of petty sessions, a barrister or solicitor), who must certify in writing that he or she explained the effect of the instrument to the donor prior to its being executed; in Alberta Report for Discussion, note 31, above, at 45.

[60] In December 1997, Alberta's *Personal Directives Act*, note 56, above, came into force. A personal directive is the same as an advance health care directive, namely a legal document in which a person sets out how his or her

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Although this certificate is no longer required, anecdotal evidence suggests that lawyers in Alberta continue to use the Certificate of Legal Advice as a matter of prudent practice.

While a Certificate of Legal Advice may ensure that the donor is informed as to the nature and quality of the act of making an EPA, such a certificate does not necessarily address all problem areas, such as concerns arising after execution and after a person has become mentally incompetent.

In the Discussion Paper, the Commission recognized that requiring legal advice may seem unduly intrusive and may be perceived as an effort by lawyers to increase business. The Commission also acknowledged that having legal advice does not guarantee that an EPA reflects the donor's wishes or that it will be drafted properly. On the other hand, the Commission suggested, mandatory legal advice may make an EPA more effective, by helping to ensure that the donor's actual wishes are followed. An EPA is a fairly technical document and a Certificate of Independent Legal Advice may ensure that the donor is fully advised before signing it. In the Discussion Paper, the Commission sought comment on whether such a certificate should be required for a valid EPA. In the event that a certificate became mandatory for a valid EPA, the Commission suggested that explanatory notes, which are to be read by a donor before signing the EPA,[61] should not be part of EPA legislation. Rather, the Commission suggested that the notes should be part of a checklist supplied by the Nova Scotia Barristers' Society or by the Continuing Legal Education Society of Nova Scotia to assist lawyers in drafting EPAs.

This issue generated a considerable amount of commentary. A number of commentators suggested that helping to ensure donors understood the significance of creating a power of attorney should outweigh any perceived or real initial drawbacks for the donor. It was considered especially important to these commentators that a donor should understand the effect of a power of attorney and its consequences, as the donor would be giving up control over his or her estate, which could result in the estate being unnecessarily depleted. Moreover, it was suggested that the requirement for mandatory legal advice might also make financial and other institutions more comfortable in relying on an EPA.

Most commentators, including the Wills and Trusts Section, Canadian Bar Association, Nova Scotia Branch, were not in favour of requiring mandatory legal advice. These commentators were especially concerned about how much mandatory legal advice might cost. These

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health care is to be managed in the event of his or her incapacity. A person may appoint someone to make health care decisions for him or her (i.e., a proxy) and/or set out specific instructions or general principles about how his or her health care is to be managed. The *Personal Directives Act* amended the *Powers of Attorney Act* so that the requirements for making EPAs are the same as those for making a personal directive. As a result, a Certificate of Legal Advice is no longer required in Alberta for a valid EPA.

[61] The notes are reproduced in the Discussion Paper at 18-19.

commentators suggested that some people, otherwise willing to execute an EPA, might choose not to do so because of the perceived cost of mandatory legal advice. It was also pointed out that requiring mandatory legal advice would not protect against all cases of abuse.

During the course of considerable discussion, the Commission did acknowledge the benefits associated with mandatory legal advice. Nonetheless, the Commission did not consider these merits sufficient to warrant imposing a requirement of mandatory legal advice on all EPAs. Moreover, the Commission took note of its recommendations in *Adult Guardianship and Personal Health Care Decisions*, which generally attempted to minimize the legal requirements associated with the preparation of advance health care directives. As a result, the Commission recommends that a Certificate of Independent Legal Advice should not be required for an EPA to be valid.

The Commission recommends that:

- A Certificate of Independent Legal Advice should not be required for an EPA to be valid.

6. Registration

None of the EPA legislation in Canada contains a mandatory registration procedure. Although Manitoba legislation states that a donor or attorney may file a copy of the EPA with the Public Trustee, filing has no effect on an attorney's duties or accounting requirements.[62] The Ontario Public Guardian Trustee's office is also considering developing a registry for people to voluntarily register their powers of attorney.[63] British Columbia's *Representation Agreement Act*, which is not in force, has a mandatory registration provision. It states that the government may make regulations providing for the establishment and operation of a representation agreement registry.[64]

The issue of registration was canvassed extensively by the Alberta Law Reform Institute. It noted that though a number of law reform agencies recommended mandatory registration, very few jurisdictions have adopted it. Mandatory registration may be favoured because it gives more protection to donors by making the EPA a matter of public record. Interested parties can then read the EPA to determine whether the attorney is acting in accordance with the

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[62] Section 12; interview with Irene Hamilton, Public Trustee for Manitoba (15 May 1998).

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donor's wishes. This rationale was followed by the Ontario and Manitoba Law Reform Commissions.[65]

Registration is required in Australia, in the Northern Territory[66] and also in Tasmania.[67] The most prominent example of a mandatory registration system for EPAs, however, is found in the United Kingdom's *Enduring Powers of Attorney Act*[68] and in the Northern Ireland Order.[69] Under this scheme, a duty to register an EPA arises once the attorney has reason to believe the donor is, or is becoming, mentally incapable. The attorney is then required to apply to the court "as soon as practicable" to register the EPA. The attorney cannot exercise authority under the EPA until it is registered with the court, except in very limited circumstances. The court has supervisory power over the attorney, including the power to give directions as to the management of the estate and the power to order the attorney to pass accounts.

A 1992 Nova Scotia report on elder abuse and neglect recommended, as part of its conclusions concerning the filing of EPAs, that when the donor of an EPA becomes legally incapacitated, the attorney should be legislatively required to file a notarized copy of the power of attorney with the court.[70]

In the Discussion Paper, this Commission stated that compulsory registration is highly bureaucratic and raises numerous privacy issues. A public registry, the Commission suggested, might enable certain persons to access other people's financial information. The Commission also suggested that an individual making an EPA has a responsibility to advise others of the EPA's existence and that registration should not therefore be mandatory.

The majority of commentators who addressed this issue were in agreement with the Discussion Paper's suggestion. Amongst the comments received were concerns about privacy and convenience. The Commission affirms its suggestion that registration of EPAs should not be mandatory.

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[65] Ontario Law Reform Commission, *Report on Powers of Attorney* (Toronto: Ontario Law Reform Commission, 1972) [hereinafter Ontario Report] at 26.

[66] *Powers of Attorney Act* 1980, No. 25, as am. by 1988, No. 42 (Northern Territory of Australia).

[67] *Powers of Attorney Act* 1934, as am. by *Powers of Attorney Amendment Act* 1987, No. 87 (Tasmania).

[68] 1985, c. 29.

[69] Enduring Power of Attorney (Northern Ireland) Order 1987, SI 1987/1627 (NI 16).

[70] Nova Scotia, *Elder Abuse/Neglect Committee Report* (Halifax: Queen's Printer, April 1992) at 11. This Commission has been advised that neither this, nor any of the Committee's other recommendations have been implemented.

The Commission recommends that:

- **Registration of EPAs should not be mandatory.**

7. Contingent powers of attorney

Most Canadian provinces appear to allow for "contingent" powers of attorney. Contingent powers of attorney are effective only upon the occurrence of a specified event.[71] The authority which the contingent power confers on the attorney therefore does not take effect until the specified contingency occurs. Where EPAs are involved, usually the contingency is the onset of mental incompetence on the part of the donor. This differs from powers of attorney which come into effect the moment they are signed and end when the donor becomes mentally incompetent. This also differs from EPAs which come into effect immediately, but continue to operate or "endure" after the donor becomes mentally incompetent. Although most powers of attorney legislation in Canada has been interpreted to allow contingent powers, these statutes generally do not define how they work or how they are triggered. Views have differed as to whether contingent powers would be recognized under Nova Scotia law.[72]

In many cases, the contingent EPA will specify not only the contingency upon which the power will take effect, but exactly how to determine whether the contingency has occurred. It may, for example, indicate that the contingency is considered to have occurred if at least one physician affirms this in writing.

In the Discussion Paper, the Commission suggested that it is important to have an express provision in the legislation dealing with contingent powers of attorney, to ensure that lawyers are fully aware of the concept when advising clients. As well, third parties, such as banks and trust companies, may be more willing to deal with an attorney under a contingent power of attorney if the legislation contains a test for determining whether the contingency has occurred.[73]

The Commission suggested that permitting donors to specify a person who will conclusively determine when mental incapacity has occurred, as takes place in some provinces,[74] is

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[71] Some jurisdictions refer to these as "springing" powers of attorney because they "spring" into effect upon the occurrence of the specified event. See *e.g.* Manitoba Report, note 8, above, at 4.

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problematic, especially if the named person is a relative or friend who may be reluctant to say the person is mentally incapable. The Commission suggested that if the contingency is the donor's mental incapacity, the written declaration of two medical practitioners would be more appropriate.

Another issue involves the language to use in the legislation so that it is clear what type of power of attorney is authorized. Manitoba legislation uses the language "springing power of attorney" in its legislation.[75] In Alberta, on the other hand, there is a section referring to "contingent powers". The Alberta legislation states that an EPA may provide that it comes into effect at a specified future time or on the occurrence of a specified contingency. The contingency includes, but is not limited to, the mental incapacity or infirmity of the donor.[76]

In the Discussion Paper, this Commission preferred the Alberta language which refers to an EPA as contingent upon future incapacity. The Commission suggested this is easier to understand than the concept of "springing" powers. The Commission suggested that it is important to specifically include contingent powers in the legislation to confirm that this type of EPA is legally valid. Some people may be reluctant, the Commission reasoned, to entrust control of their affairs to another person even though this would not take effect until the donor becomes incapacitated. They may be more willing to do so if the legislation specifically authorizes contingent powers. At present, most EPAs are not contingent and simply rely upon the goodwill of the attorney not to use the power until it is needed.

This issue generated considerable commentary, with the majority of commentators having some concern with the Commission's suggestions. Some commentators considered the requirement for two medical certificates to be excessive. Other commentators stated there are other appropriate choices besides physicians to appoint as people suitable to make the determination of mental incompetence, and that the donor should be entitled to choose who could make such a determination. A number of other commentators did not disagree generally with the Commission's suggestion for medical certificates to prove the onset of a donor's mental incapacity, but suggested this should only be used as a default mechanism, where a donor did not make some other specific provision in the EPA.

Upon considerable discussion, the Commission agrees that a donor should be able to specify a person who would conclusively determine when mental incompetence on the part of the donor has occurred. This is the approach used, for example, in the Manitoba and Alberta legislation, which place no restrictions on whom a donor may choose as the person who will conclusively decide whether the relevant contingency has occurred.[77] This Commission agrees

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[75] Note 32, above, s. 6.

[76] Note 40, above, s. 5.

[77] Note 32, above (Manitoba); note 40, above (Alberta).

that donors should be able to exercise free will and display their trust, not only through the choice of an attorney, but also through the selection of a person whose decision will bring a contingent EPA into effect. The Commission also acknowledges, though, that making a determination of mental incompetence could prove daunting to a lay person. The Commission therefore recommends that in addition to the person named by the donor, a practicing physician must agree in writing that the donor is mentally incompetent. This would provide reassurance to the person specified for this purpose by the donor and would help to prevent misuse of the power. If the person named by the donor refused or was unable to make the determination, then the written declaration of two medical practitioners would be required, as a default mechanism. This default mechanism would also apply if the EPA did not specify someone to determine the onset of mental incompetence.

The Commission recommends that:

- EPA legislation should deal specifically with contingent EPAs.
- If an EPA is contingent upon the onset of the donor's mental incompetence, the donor should be able to specify a person who would conclusively determine when mental incompetence on the part of the donor has occurred. In addition to the person named by the donor, a practicing physician must agree in writing that the donor is mentally incompetent.
- For an EPA contingent upon the donor's mental incompetence, if the EPA does not specify a person to determine the donor's mental incompetence, or if the specified person refuses or is unable to make the determination, then the certificates of two medical practitioners would be required to prove that the contingency has occurred.

Using an EPA

8. Duty to act

As explained above,[78] a power of attorney ordinarily comes into effect when it is executed. It does not require the attorney's consent to come into effect.[79] Without having consented to fulfill the power, the attorney is not required to do so. Although the attorney has the power to

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[78] Part II.1, above.

[79] T. Aldridge, *Powers of Attorney*, 8th ed. (London: Longman, 1991) at 3.

that donors should be able to exercise free will and display their trust, not only through the choice of an attorney, but also through the selection of a person whose decision will bring a contingent EPA into effect. The Commission also acknowledges, though, that making a determination of mental incompetence could prove daunting to a lay person. The Commission therefore recommends that in addition to the person named by the donor, a practicing physician must agree in writing that the donor is mentally incompetent. This would provide reassurance to the person specified for this purpose by the donor and would help to prevent misuse of the power. If the person named by the donor refused or was unable to make the determination, then the written declaration of two medical practitioners would be required, as a default mechanism. This default mechanism would also apply if the EPA did not specify someone to determine the onset of mental incompetence.

The Commission recommends that:

- EPA legislation should deal specifically with contingent EPAs.
- If an EPA is contingent upon the onset of the donor's mental incompetence, the donor should be able to specify a person who would conclusively determine when mental incompetence on the part of the donor has occurred. In addition to the person named by the donor, a practicing physician must agree in writing that the donor is mentally incompetent.
- For an EPA contingent upon the donor's mental incompetence, if the EPA does not specify a person to determine the donor's mental incompetence, or if the specified person refuses or is unable to make the determination, then the certificates of two medical practitioners would be required to prove that the contingency has occurred.

Using an EPA

8. Duty to act

As explained above,[78] a power of attorney ordinarily comes into effect when it is executed. It does not require the attorney's consent to come into effect.[79] Without having consented to fulfill the power, the attorney is not required to do so. Although the attorney has the power to

[78] Part II.1, above.

[79] T. Aldridge, *Powers of Attorney*, 8th ed. (London: Longman, 1991) at 3.

act, at common law, there is no duty on the attorney to act.[80] Therefore, an EPA places no obligation on an attorney to act as attorney once the donor becomes mentally incompetent. The common law position has, however, been altered by legislation in many provinces. Also, the attorney may be required to act if he or she has a contract with the donor in which the attorney promised to act. Such a contract would be an indication of the attorney's consent to act.

The Manitoba Law Reform Commission recommended that if the donor of an EPA becomes mentally incompetent, an attorney should be under a positive duty to act.[81] The Manitoba Commission was of the view that when the donor is unable to terminate the attorneyship due to mental incompetence, the law should encourage the attorney to act consistently with what the donor would have chosen had he or she been able to do so. The Manitoba legislature accepted this recommendation, and Manitoba legislation now imposes a duty on an attorney to act for an incompetent donor.[82] The Alberta Law Reform Institute took the approach that a statutory duty to act should arise when the attorney knows or ought to know that the donor is mentally incapable of managing his or her affairs. It further stated that the duty to act should not be imposed unless the attorney has accepted the appointment, either expressly or by implication. It rejected the idea of an attorney being a trustee. A trustee holds property for the benefit of another person.[83] The Alberta Institute did not approve of deeming the attorney to be a trustee largely because of Alberta's *Trustee Act*, which contains strict limitations on how a trustee can invest money. It also allows the court to vary the terms of the trust or appoint a substitute trustee, which the Alberta Institute recommended against. Other law reform commissions have been divided on whether there should be a duty to act as attorney.[84]

In the Discussion Paper, this Commission suggested that a positive duty to act should be imposed when the donor of an EPA becomes incompetent. It did not, however, favour making an attorney a trustee of the donor's property. A trusteeship is a more onerous obligation than an attorneyship. As circumstances can change greatly from the time when a

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[80] *Bowstead on Agency*, note 34, above, at 44; G.H.L. Fridman, *The Law of Agency*, 5th ed. (London: Butterworths, 1983) at 137ff.

[81] Manitoba Report, note 8, above, at 17-18.

[82] Note 32, above, s. 19. At section 9, the Manitoba statute also provides that where a contingent power of attorney is involved, and an attorney chooses not to act because of a mistaken but reasonable belief in good faith that the power of attorney has not come into effect, the attorney will not for that reason alone be held liable.

[83] J. R. Nolan and M. J. Connolly, *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West, 1979) at 1357.

[84] Law reform agencies in Newfoundland, British Columbia, South Australia, and Tasmania concluded that such a duty should be required. Law reform agencies in the United Kingdom, New South Wales, the Australian Capital Territory and the Republic of Ireland, however, recommended against imposing a statutory duty to act: Alberta Report for Discussion, note 31, above, at 29.

person drafts an EPA until the time it is needed, the Commission suggested that an attorney should not be burdened with all the responsibilities of a trustee. The Commission suggested that an attorney should only have a duty to act if he or she knows or ought reasonably to know that the donor is mentally incompetent and the attorney has assumed management of the estate or contracted to do so.

No comments were received in disagreement with the Commission's suggestions on this issue, which the Commission affirms.

The Commission recommends that:

- **When a donor of an EPA becomes mentally incompetent, the attorney has a duty to act:**

  1. **if he or she knows or ought reasonably to know that the donor is mentally incompetent; and**

  2. **if he or she has assumed management of the estate or contracted with the donor to do so.**

9. Confidentiality

Issues regarding confidentiality of information may arise in determining whether a donor has become mentally incompetent. A physician or other health care professional may be unable or reluctant to disclose information about a patient without the patient's consent. The donor may, however, be incapable of giving a valid consent. If the EPA expressly provides for a named person to determine whether the donor has become mentally incompetent, the health care practitioner may be reluctant to disclose information without a specific consent authorizing him or her to release the information to that named person. The health care practitioner may therefore refuse to disclose the information needed to assess the donor's competence and determine whether the EPA becomes effective.

EPA legislation in Nova Scotia, Newfoundland, Prince Edward Island, Saskatchewan, and New Brunswick does not deal with this issue, but more recent legislation, such as that in Alberta and Manitoba, has addressed this problem.[85] In Alberta, the Alberta Law Reform Institute recommended that the legislation authorize the release of information concerning the donor's mental and physical health for the purpose of confirming whether the specified

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[85] Note 20, above.

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[85] Note 20, above.

contingency has occurred.[86] This requires that the health care practitioner release the information and protects the practitioner should the donor later complain that it was released without his or her consent. This recommendation was incorporated into the Alberta legislation[87] and the same approach was taken in Manitoba.[88]

In the Discussion Paper, this Commission supported the Alberta and Manitoba approach because physicians may refuse to assess an individual due to an inability to obtain consent. The Commission suggested that a section authorizing the release of confidential information, for the limited purpose of determining whether a donor is mentally competent, should be part of the legislation. The Commission affirms this suggestion and adds as a matter of clarification that the information could be released to any person named for that purpose in an EPA or to people authorized by law to determine whether a donor was mentally incompetent.

Upon further consideration, the Commission also acknowledges that such a change may require an amendment to the *Hospitals Act*,[89] which at section 71 governs the confidentiality of health records.

The Commission recommends that:

- **Legislation should authorize the release of confidential information to authorized people concerning the donor's mental and physical health for the limited purpose of determining whether the contingency of mental incompetence has occurred. Such a change may require an amendment to the *Hospitals Act*, which at section 71 governs the confidentiality of health records.**

10. Duty of care

At common law, the relationship between donor and attorney is fiduciary in nature. This means that as part of his or her duties an attorney is required to account, exercise reasonable care, not make secret profits, and not act contrary to the interests of the donor.[90]

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[86] Albert Report for Discussion, note 31, above, at 89.

[87] Note 40, above, s. 6.

[88] Note 32, above, s. 6(5).

[89] R.S.N.S. 1989, c. 208.

[90] *Canadian Estate Administration Guide*, note 26, above, at 20,006. These duties would be in addition to those set out in the power of attorney.

The Alberta Law Reform Institute considered whether the attorney's duties should be set out in legislation. It concluded that "the nature and extent of the attorney's duties are well established and there is no reason to incorporate them into the proposed legislation".[91] This is reflected in the legislation which resulted from the Alberta Institute's report.

In preparing the Discussion Paper, this Commission was divided on how this issue should be addressed. On the one hand, it may not be necessary to set out the duties of the attorney in the legislation since, as the Alberta Institute pointed out, the common law is quite clear on these duties. On the other hand, including the duties in the legislation may make people more aware of their obligations. The Commission concluded, on balance, that it was better to explain in the legislation the nature of the relationship between the donor and attorney.

The standard of care expected of an attorney will vary according to whether he or she is paid for services. If an attorney is acting gratuitously (i.e., without pay), the attorney is held to the standard of a typically prudent person managing his or her own affairs.[92] If being paid for his or her services, however, an attorney is held to a higher standard, that applicable to a professional property or financial manager.[93]

In the Discussion Paper, the Commission suggested that the duty of care owed by an attorney to a donor should involve the attorney exercising the judgment and care that a reasonably prudent person in comparable circumstances would exercise.

The comments received on this issue were in favour of the Discussion Paper's suggestions, which the Commission affirms.

The Commission recommends that:

- EPA legislation should specify that the relationship between donor and attorney is fiduciary in nature. As part of his or her duties, an attorney should be required to account, exercise reasonable care, not make secret profits, and not act contrary to the interests of the donor.

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[91] Alberta Report for Discussion, note 31, above, at 66.

[92] *Bowstead on Agency*, note 34, above, at 152-155.

[93] Note 92, above, at 144ff.

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In the Discussion Paper, the Commission suggested that the duty of care owed by an attorney to a donor should involve the attorney exercising the judgment and care that a reasonably prudent person in comparable circumstances would exercise.

The comments received on this issue were in favour of the Discussion Paper's suggestions, which the Commission affirms.

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[91] Alberta Report for Discussion, note 31, above, at 66.

[92] *Bowstead on Agency*, note 34, above, at 152-155.

[93] Note 92, above, at 144ff.

11. Liability of the attorney

As discussed above, at common law a power of attorney ends if the donor becomes mentally incompetent. If this occurs, an attorney can be held liable to third parties with whom he or she deals under the authority of the power of attorney, even if the attorney did not know of the termination. Such an attorney would be in breach of the "implied warranty of authority" as was decided by the English Court of Appeal in *Yonge* v. *Toynbee*.[94] In that case, a man instructed his lawyers to defend him against legal action which was about to be brought against him. Before the legal action commenced, he was certified as being of "unsound mind". Unaware of this, the lawyers conducted legal proceedings on his behalf. The court held the man's lawyers personally liable for having impliedly warranted, or held out, an authority they did not possess. In other words, they were liable for acting on his behalf when they were acting under a power of attorney that had been terminated by his incompetence. They therefore had no authority to act on his behalf.

Both the Alberta Law Reform Institute and the Ontario Law Reform Commission have questioned the validity of the *Yonge* case.[95] Most provinces have chosen not to follow it by providing protection for an attorney in their EPA legislation. Nova Scotia's *Powers of Attorney Act* does not deal with liability of the attorney.

Several of the more recent EPA statutes have expanded upon the issue of liability of the attorney. For example, the attorney's liability for having acted in good faith arises not only in the event that the EPA is terminated, but in the event that the EPA may have been invalid to begin with. This may occur, for example, if the donor was incompetent at the time of executing the EPA.[96]

To address the concerns raised by other law reform commissions with respect to the *Yonge* decision, this Commission suggested in the Discussion Paper that an attorney should be protected from liability for having acted in good faith, not only in the event that the EPA is terminated, but also if the EPA was invalid to begin with. Those comments received by the Commission on this issue were in favour. The Commission affirms this suggestion.

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[94] [1910] 1 K.B. 215 (C.A.).

[95] Alberta Report for Discussion, note 31, above, at 106; Ontario Report, note 65, above, at 380.

[96] For example, s. 14 of the Alberta statute, note 40, above. Section of the Ontario Act, note 28, above, also deals with the exercise of a power of attorney after termination or invalidity. The Ontario provision does not address the liability issue if the EPA was invalid at the time of execution; rather, only if it "becomes invalid".

The Commission recommends that:

- If the EPA has been terminated or is not valid, an attorney should be protected from liability for having acted in good faith if the attorney did not know and had no reasonable grounds for believing that the attorney's authority had been terminated or lost.

12. Authority to benefit others

It is a common law rule that under a power of attorney, an attorney may not make a gift of or otherwise use the donor's property for the benefit of anyone other than the donor.[97] This rule results from the fiduciary nature of the relationship between a donor and attorney. The rule can be changed, however, by the donor's specific instructions contained in the EPA. Most donors will, for example, specify in the EPA the fees and costs to be paid to the attorney as well as any payments the attorney may make to third parties. If this has not been set out and the donor becomes mentally incompetent, the donor can no longer consent to such payments being made.

This approach has been changed by statute in some jurisdictions. For example, the United Kingdom *Act* provides that an attorney may act under an EPA to benefit persons, other than the donor, if the donor might normally be expected to provide for the needs of those persons.[98] It also allows for seasonal gifts to relatives and others connected with the donor and for gifts to charities that the donor previously supported or might reasonably be expected to support.[99] Similar provisions are contained in the legislation in New Zealand and Northern Ireland.[100]

The Alberta Law Reform Institute also recommended that attorneys not be left without authority to attend to the needs of the donor's spouse and dependent children (either category of which might include the attorney). It did not, however, recommend that the legislation

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[97] An agent may not, without the informed consent of his or her principal, use the principal's property to acquire a personal benefit for the agent: *Bowstead on Agency,* note 34, above, at 175.

[98] *Enduring Powers of Attorney Act* 1985, c. 29 s. 3(4); this includes a benefit to the attorney and is subject to any conditions or restrictions contained in the EPA.

[99] Note 98, above, s. 3(5); provided that the value of each gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate.

[100] *Protection of Personal and Property Rights Act* 1988, No. 4, s. 107 (N.Z.) and Enduring Powers of Attorney (N. Ireland) Order 1987, SI 1987/1627 (NI 16) ss. 5(4) and 5(5), as cited in Alberta Report for Discussion, note 31, above, at 76, n. 20.

The Commission recommends that:

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should make express provision for seasonal gifts or charitable donations.[101] The Alberta legislation states that an attorney may use his or her authority for the maintenance, education, benefit and advancement of the donor's spouse and dependent children (including the attorney, if the attorney is the donor's spouse or dependent child).[102] Any other gifts must be specifically provided for in the EPA.

A similar approach was taken in Manitoba. Manitoba legislation allows the attorney to dispose of the donor's estate in order to satisfy a legal obligation of the donor to maintain and support another person, which may include the attorney.[103]

Ontario's *Act* contains fairly detailed provisions explaining the expenditures allowed by an attorney including gifts or loans as well as charitable gifts in certain circumstances.[104]

In the Discussion Paper, this Commission concluded that allowing an attorney to make seasonal gifts or loans to friends and relatives is problematic and provides opportunity for financial abuse. The Commission suggested that the legislation should, however, confirm that the donor may authorize specific third party payments in the EPA. The Commission also suggested that the legislation allow an attorney to provide for the reasonable maintenance and support of the dependants.

A number of commentators who responded to this issue in the Discussion Paper suggested that an attorney, where possible, be required to take into account provisions in the donor's last will. These commentators suggested this would help to ensure that the attorney did not deplete the donor's estate by making third party payments which were authorized in an EPA, thereby making it impossible to distribute gifts identified in the donor's will.

The Commission is of the view that as an attorney's authority and obligations originate with the EPA, an attorney should not be restricted by other documents which may not specifically mention him or her. The Commission is also concerned that such a requirement may place an attorney in the difficult situation of having to decide whether to spend less money on the maintenance of a donor, in order to preserve estate assets referred to in a will. As a result, though acknowledging commentators' concerns, the Commission affirms the Discussion Paper suggestions about an attorney's authority to benefit third parties.

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[101] Albert Report for Discussion, note 31, above, at 77.

[102] Note 40, above, s. 7(b); this is similar to the approach seen in Alberta's *Dependent Adults Act*, R.S.A. 1980, c. D-32, its adult guardianship legislation similar in purpose to Nova Scotia's *Incompetent Persons Act*.

[103] Note 32, above, s. 23.

[104] Note 28, above, s. 37. Those provisions are reproduced in the Discussion Paper at 31-32.

The Commission recommends that:

- The legislation should specifically state that an EPA may authorize third party payments, including charitable and seasonal gifts. If the EPA does not authorize such payments, an attorney may not authorize charitable or seasonal gifts.
- An attorney should be able to provide for the reasonable maintenance and support of the donor's dependants.

13. Accounting

At common law, one of the duties of an attorney is to account.[105] This means that an attorney must maintain accurate accounts of all transactions entered into for the donor and must produce them upon request.[106] If the donor is mentally competent, he or she can choose whether to request an accounting. If the donor is no longer mentally competent, however, the question arises as to whom the attorney is to account and when. Statutes based on the U.L.C.C. draft *Act* allow interested parties to apply to court to require that the attorney "pass" or produce for approval his or her accounts.[107]

Nova Scotia's Public Trustee has indicated to the Commission that an attorney has never filed accounts with that office, either voluntarily or after being ordered to do so by the court.

If the court orders the attorney to file accounts, it requires that accounts be filed for transactions entered into during the incompetence of the donor. In other words, the court has to determine when the donor became mentally incompetent. The court will need evidence to assist it in making this determination. This becomes problematic if the evidence is not readily available. The Alberta Law Reform Institute concluded that courts may incorrectly determine the date on which mental incapacity "occurred", thus leaving many financial transactions not covered by the accounting. As a result, the Alberta Institute recommended that "the court have the discretion to grant whatever order for accounting it considers appropriate".[108] This is reflected in the Alberta legislation, which requires the attorney to bring and pass accounts in

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[105] This is in light of the fiduciary relationship between the donor and attorney.

[106] *Halsbury's Laws of England*, vol. 1, 4th ed. (London: Butterworths, 1980) at para. 780.

[107] See, *e.g.*, ss. 5(2) and 5(4) of the Nova Scotia *Act*, which are reproduced in the Discussion Paper at 33. An exception to this is the Saskatchewan legislation, note 20, above.

[108] Alberta Report for Discussion, note 31, above, at 73.

The Commission recommends that:

- **The legislation should specifically state that an EPA may authorize third party payments, including charitable and seasonal gifts. If the EPA does not authorize such payments, an attorney may not authorize charitable or seasonal gifts.**

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[108] Alberta Report for Discussion, note 31, above, at 73.

respect of "any or all transactions".[109]

The Manitoba Law Reform Commission considered, at length, the problem of holding the attorney accountable during the donor's mental incompetence. It concluded that a court ordered accounting is too time-consuming and expensive. Instead, it suggested a system in which a regular accounting would be provided and a court order would only be required in unusual circumstances. It relied, in part, on a common law principle that allows the donor to name a person who will receive the attorney's accounts in the donor's place (in this case, while the donor is incompetent and unable to receive them).[110] The Manitoba Commission also proposed that the legislation allow the donor to name people to whom the attorney would be obliged to account on an annual basis. It suggested that the named people should have an interest in protecting the donor's property, as they would likely take action if fraud or mismanagement was detected.[111] The Manitoba Commission concluded that the named recipients be those most likely to be the donor's heirs. These people would usually be the donor's closest relatives and those who are most likely to inherit the donor's property.[112]

The legislation which followed the Manitoba Commission report defines "nearest relative" to mean:

> *(a) the adult who is related to the donor, mentally competent and first listed in the following series:*
>
> *(i) spouse,*
> *(ii) child,*
> *(iii) grandchild,*
> *(iv) great-grandchild,*
> *(v) parent,*
> *(vi) sibling,*
> *(vii) niece or nephew, or*
>
> *(b) where no person qualifies under clause (a), the Public Trustee.*[113]

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[109] Note 40, above, s. 10.

[110] *Halsbury's Laws of England*, note 106, above, at 68; *Bowstead on Agency*, note 34, above, at 191; *Dadswell* v. *Jacobs* (1887), 34 Ch. D. 278 (C.A.) [cited in Manitoba Report, note 8, above, at 18 (n.9)].

[111] Manitoba Report, note 8, above, at 18.

[112] Note 111, above, at 20-21.

[113] Note 32, above, s. 1. The Manitoba Law Reform Commission, in its definition of nearest relative, was of the view that the first priority should be given to the donor's spouse or "spousal equivalent": Manitoba Report, note 8, above, at 20-21.

In the Discussion Paper, this Commission preferred the Manitoba approach, which allows an informal yet mandatory accounting process. It allows the donor to address not only who will make the financial decisions, but who will, in effect, review those decisions based on the accounting provided. The Commission suggested that the person named as recipient of the accounting should also receive a copy of the EPA. This would better enable him or her to assess whether the money is being spent appropriately and consistently with the donor's instructions.

The Commission also suggested that the court maintain its supervisory authority to order accounting for a period other than during incapacity. This may be necessary, the Commission reasoned, to prove financial abuse which may occur under an EPA while the donor is mentally capable, but unaware that the EPA was being misused. Upon termination of an EPA, the attorney should also be required to provide a final accounting.

Although commentators were generally in agreement with the Discussion Paper on this issue, there was some suggestion that an attorney, when acting under an EPA, should also be required to keep in mind the contents of a donor's will. In particular, one commentator referred to the approach under Ontario law, whereby an attorney has an obligation to preserve gifts made in the donor's will. The commentator added that without such a rule, there was a possibility of the gifts in the will being depleted by the attorney. The Commission takes note of this concern, but does not adopt that suggestion, in order to prevent placing an attorney in a situation of conflict between having to satisfy the terms of the power of attorney and also having to respect the terms of a will. Such a conflict could be especially pronounced where the will was created a number of years before the power and overestimated the value of the estate. The Commission affirms its Discussion Paper suggestions on this issue.

M121

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The Commission recommends that:

- **The donor should be able to request an accounting at any time.**
- **When the donor is mentally incompetent, the attorney should be required to provide an accounting upon the demand of any person named for that purpose in the EPA. If the donor does not name anyone in the EPA, or if the named person is the attorney or the spouse of the attorney or is deceased or mentally incompetent, the attorney shall provide an annual accounting to the donor's nearest relative.**
- **"Nearest relative" means the adult person who is related to the donor, mentally competent and first listed in the following series: spouse, child, grandchild, great-grandchild, parent, sibling, niece or nephew, or where none of these people qualify, the Public Trustee.**
- **The court should have the discretion to grant an order for accounting, as it considers appropriate.**
- **An attorney should also be required to account upon termination of an EPA.**

14. Protection to third parties

An attorney, in the course of acting under an EPA, deals with many third parties. When the attorney's authority is terminated, third parties who are unaware of the termination may continue to deal with the attorney. At common law, the donor remains liable to these third parties. This rule has been made part of legislation in most provinces.[114] It is not, however, included in the Nova Scotia statute. The U.L.C.C. draft *Act* and the Saskatchewan *Act* go a step further, in providing that an act by an attorney in favour of a person who is unaware of the termination is valid and binding in favour of that person "and in favour of a person claiming under him" (i.e., fourth parties).[115] Law reform agencies in other provinces, however, criticized this approach. The Alberta Institute concluded, "it refers only to the knowledge of the party who deals with the attorney, and thus it may afford protection to fourth parties even if they know of the termination of authority."[116] As a result, the Alberta Institute recommended that the attorney's act be valid and binding in favour of any person who did not

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[114] Alberta Report for Discussion, note 31, above, at 107.

[115] S. 1(1) [U.L.C.C. *Act*], note 21, above; s. 2(1) [Saskatchewan *Act*], note 20, above.

[116] Alberta Report for Discussion, note 31, above, at 109.

know of the termination.[117] This is reflected in the Alberta legislation.[118]

British Columbia's *Act* states that if the agreement is not in effect or is invalid, any exercise of the authority is valid and binding in favour of a person who did not know and had no reason to believe that the agreement (or provision) was not in effect or was invalid.[119] As in Alberta, this provides broad protection to parties dealing with attorneys.[120]

In the Discussion Paper, this Commission suggested that if the attorney's authority under the EPA has been terminated, an attorney's act should be valid and binding in favour of any person who did not know of the termination. Comments received by the Commission were generally in favour of this suggestion. Upon further consideration, the Commission agrees that in addition to the validity of an attorney's act, the enforceability of an attorney's act against a third party, who did not know of the power's termination, should also be made part of the Commission's recommendation. Both the benefits and obligations of agreements entered into with an attorney under an EPA would therefore be applied to third parties who did not know of the power's termination.

The Commission recommends that:

- If the attorney's authority under the EPA has been terminated, an attorney's act should be valid and binding in favour of and enforceable against any person who did not know of the termination.

Changing/Ending an EPA

15. Renunciation by attorney

A power of attorney ordinarily comes into effect when it is executed and does not require the attorney's consent in order to come into effect.[121] In some cases, a person named as attorney may not wish to act. At common law, he or she may renounce the appointment by giving

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[117] Note 116, above, at 109.

[118] Note 40, above, s. 14(2).

[119] Note 33, above, s. 24(2).

[120] A similar provision is seen in section 13 of Ontario's *Substitute Decisions Act*, note 28, above.

[121] See Part III.8, above.

The Commission recommends that:

- **The donor should be able to request an accounting at any time.**
- **When the donor is mentally incompetent, the attorney should be required to provide an accounting upon the demand of any person named for that purpose in the EPA. If the donor does not name anyone in the EPA, or if the named person is the attorney or the spouse of the attorney or is deceased or mentally incompetent, the attorney shall provide an annual accounting to the donor's nearest relative.**
- **"Nearest relative" means the adult person who is related to the donor, mentally competent and first listed in the following series: spouse, child, grandchild, great-grandchild, parent, sibling, niece or nephew, or where none of these people qualify, the Public Trustee.**
- **The court should have the discretion to grant an order for accounting, as it considers appropriate.**
- **An attorney should also be required to account upon termination of an EPA.**

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In the Discussion Paper, this Commission suggested that if the attorney's authority under the EPA has been terminated, an attorney's act should be valid and binding in favour of any person who did not know of the termination. Comments received by the Commission were generally in favour of this suggestion. Upon further consideration, the Commission agrees that in addition to the validity of an attorney's act, the enforceability of an attorney's act against a third party, who did not know of the power's termination, should also be made part of the Commission's recommendation. Both the benefits and obligations of agreements entered into with an attorney under an EPA would therefore be applied to third parties who did not know of the power's termination.

The Commission recommends that:

- If the attorney's authority under the EPA has been terminated, an attorney's act should be valid and binding in favour of and enforceable against any person who did not know of the termination.

Changing/Ending an EPA

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[117] Note 116, above, at 109.

[118] Note 40, above, s. 14(2).

[119] Note 33, above, s. 24(2).

[120] A similar provision is seen in section 13 of Ontario's *Substitute Decisions Act*, note 28, above.

[121] See Part III.8, above.

notice to the donor.[122] The question arises as to whether the right to renounce should be allowed if the donor is mentally incompetent. The Alberta Law Reform Institute was of the view that an attorney should not be able to leave a donor's estate in limbo by renouncing the appointment. It therefore recommended that if an attorney has a duty to act,[123] the attorney should not be able to renounce without the court's permission. The duty to act, which is now part of the Alberta legislation, arises if the EPA has not been terminated and if the attorney has at any time acted under the EPA or otherwise indicated acceptance of the appointment. An application to renounce would be considered to be an application to have the EPA terminated. If the court allows the attorney to renounce the appointment in Alberta, it can also direct the applicant or the Public Trustee to bring an adult guardianship application.[124]

Manitoba legislation also states that an attorney may not renounce while he or she is subject to "the duty to act" unless the court's permission is obtained.[125] Ontario legislation allows an attorney to resign, but if the attorney has already acted under the EPA, the resignation is not effective until a copy of the resignation is sent to a number of people, including the donor, other attorneys under the EPA, and the spouse or partner of the donor.[126]

In the Discussion Paper, this Commission suggested that a person should not be forced to continue to act as an attorney against his or her wishes. The Commission reasoned that if many years have passed from the time of naming the attorney, that person may have become unable or unwilling to act. Also, forcing an unwanted duty on an attorney would likely mean that the job would not be done properly. The Commission suggested it would not be in the donor's best interests to have such a person continue. If the donor is mentally competent, the Commission suggested, an attorney should be able to renounce with notice to the donor. When the donor is no longer mentally competent, the Commission suggested that the attorney should be required to apply to court to renounce the appointment if he or she has assumed management of the estate or contracted to do so. In the interim period before the court hears the application, the person should be required to continue to act as attorney.

The Commission also suggested it would also be useful to provide notice of an application to renounce to the Public Trustee. The Public Trustee may be asked to become a guardian if an application for guardianship is later made. The notice would advise the Public Trustee of a possible guardianship application.

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[122] *Halsbury's Laws of England,* note 106, above, at para. 879.

[123] See Part III.8, above.

[124] Alberta Report for Discussion, note 31, above, at 96-97; this approach is reflected in ss. 8 and 12 of the Alberta Act, note 40, above.

[125] Note 32, above, s. 21.

[126] Note 28, above, s. 11.

There was general agreement amongst the commentators with the Commission's suggestions on this issue. Some commentators did suggest that an attorney who has commenced to fulfill his or her responsibilities as attorney should be able to renounce without court approval in favour of an alternate of the attorney's choosing. The Commission takes note of this suggestion, but believes that attorneyship is a personal appointment, which should not be delegated. Another commentator remarked that a sole attorney should be able to renounce only with court approval where the donor is incompetent and the attorney has not assumed management of the estate. The Commission is not of the view, however, as a person cannot be forced to accept a personal appointment. If this means there might be no attorney to administer the donor's affairs, then a guardianship application would be necessary under the *Incompetent Persons Act*.[127] The Commission therefore affirms its Discussion Paper suggestions.

The Commission recommends that:

- An attorney should be able to renounce an appointment by giving notice to the donor.
- If the donor is no longer mentally competent and the attorney has assumed management of the estate or contracted to do so, the attorney must apply to court in order to renounce the appointment. In the interim period before the court hears the application, the person should be required to continue to act as attorney.
- Notice of an application to renounce should be given to the Public Trustee.

16. Termination

At common law, a power of attorney is terminated by a number of events:

(a) the death or mental incompetence of the donor,
(b) the death or mental incompetence of the attorney,
(c) the bankruptcy of the donor,
(d) the renunciation by the attorney,
(e) the revocation by the donor, or
(f) the coming to pass of a time or event specified in the power of attorney after which it is terminated.[128]

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[127] Note 42, above. See also note 1, above.

[128] *Canadian Estate Administration Guide*, note 26, above, at 29,700.

There was general agreement amongst the commentators with the Commission's suggestions on this issue. Some commentators did suggest that an attorney who has commenced to fulfill his or her responsibilities as attorney should be able to renounce without court approval in favour of an alternate of the attorney's choosing. The Commission takes note of this suggestion, but believes that attorneyship is a personal appointment, which should not be delegated. Another commentator remarked that a sole attorney should be able to renounce only with court approval where the donor is incompetent and the attorney has not assumed management of the estate. The Commission is not of the view, however, as a person cannot be forced to accept a personal appointment. If this means there might be no attorney to administer the donor's affairs, then a guardianship application would be necessary under the *Incompetent Persons Act*.[127] The Commission therefore affirms its Discussion Paper suggestions.

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[127] Note 42, above. See also note 1, above.

[128] *Canadian Estate Administration Guide*, note 26, above, at 29,700.

As discussed further below, the Commission is of the view that all of those terminating events, with the exception of the bankruptcy of the donor, are applicable to EPAs. Although the Nova Scotia *Act* deals generally with EPAs, it does not specifically refer to these terminating events.

The Alberta Law Reform Institute dealt extensively with the issue of termination of EPAs. First of all, it recommended that an EPA should terminate upon a trusteeship order being granted under the *Dependent Adults Act*. This process is similar to the appointment of a guardian under Nova Scotia's *Incompetent Persons Act*. It also recommended that the EPA terminate on the death of the donor, except in cases of irrevocable powers of attorney. These recommendations are consistent with the common law approach. The Alberta Institute also recommended that the EPA terminate on the death of the attorney. It suggested that the bankruptcy of the donor, however, should not result in automatic termination of the EPA as "it is probably in the best interests of the donor to have the attorney's authority continue, so as to enable the attorney to make decisions on the donor's behalf in relation to matters connected with the bankruptcy".[129] These recommendations were implemented in legislation that followed the Alberta Institute report.[130]

The Manitoba Law Reform Commission recommended that an EPA terminate upon the death of the donor. In its view, the death of the attorney, although it would obviously terminate the attorneyship, would not necessarily have to terminate the EPA. This relates back to its suggestion that a court be permitted to substitute an attorney for the individual named by the donor. It also recommended that the attorneyship be terminated by the mental incompetence of the attorney, the bankruptcy of the attorney or the bankruptcy of the donor (unless otherwise provided for in the EPA).[131] However, it suggested that a certificate of incompetence or an "order of supervision concerning the donor" (under Manitoba's mental health legislation) should not terminate the EPA.

In its Discussion Paper, this Commission agreed that an EPA should terminate if it is revoked by the donor or if the donor dies. It also suggested that, subject to the court's right to vary the terms of the EPA and to substitute a named alternate as attorney for the person named by the donor, an EPA should terminate on the death or the mental incapacity of the attorney. The bankruptcy of the donor, however, would not result in automatic termination, since it would be to the donor's benefit to have the attorney represent the donor's interest in the bankruptcy proceedings. The bankruptcy of the attorney would also terminate an EPA, as would the renunciation of the attorney, or the coming to pass of a time or event specified in the EPA. If

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[129] Alberta Report for Discussion, note 31, above, at 103.

[130] Note 40, above, s. 13.

[131] Manitoba Report, note 8, above, at 29-30.

a court ordered the appointment of a guardian under the *Incompetent Persons Act*, this would also terminate the EPA.

There was general agreement amongst the comments received on this issue. The Commission affirms its suggestions and also recommends, to clarify a matter not made apparent in the Discussion Paper, that EPA legislation should specify the events which would result in the termination of an EPA.

The Commission recommends that:

- **An EPA should terminate if it is revoked by the donor or if the donor dies.**
- **Subject to the court's right to vary the terms of an EPA, including the right to substitute a named alternate as attorney, an EPA should also terminate upon:**
  - **the bankruptcy of the attorney;**
  - **the death or mental incompetence of the attorney;**
  - **the renunciation of the attorney;**
  - **the coming to pass of a time or event specified in the EPA; or**
  - **the appointment of a guardian under the *Incompetent Persons Act*.**
- **EPA legislation should specify the events which would result in the termination of an EPA.**
- **The bankruptcy of the donor should not automatically terminate the EPA since the attorney can represent the donor's interests at the bankruptcy proceedings.**

17. Revoking a power of attorney – required procedure

One commentator on the Discussion Paper inquired whether a donor who wished to revoke an EPA had to take any specific measures. A donor who is mentally competent can revoke a power of attorney at any time.[132] Revocation takes place when the donor provides notice to the attorney. This does not have to be in writing.[133] Having said this, it is in a donor's best interests that the notice should be in writing. A written notice should help to prevent misunderstandings and in the event of a dispute, should serve as strong proof of the donor's intentions. As proof of its validity, the notice should be signed by the donor and, if possible, witnessed. The completed notice should then be hand delivered to the attorney. Regular mail

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[132] Manitoba Report, note 8, above, at 25.

[133] C. Harvey, *Agency Law Primer* (Scarborough, Ont.: Carswell, 1993) at 139; *Halsbury's Laws of England*, vol. 1(2), 4th ed. (London, UK: Butterworths, 1990) at para. 191.

a court ordered the appointment of a guardian under the *Incompetent Persons Act*, this would also terminate the EPA.

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The Commission recommends that:

- An EPA should terminate if it is revoked by the donor or if the donor dies.
- Subject to the court's right to vary the terms of an EPA, including the right to substitute a named alternate as attorney, an EPA should also terminate upon:
  - the bankruptcy of the attorney;
  - the death or mental incompetence of the attorney;
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is not recommended, as the attorney might perform transactions to the donor's detriment during the period before delivery. The Commission takes the position that EPA legislation should require that a donor who wishes to revoke an EPA must provide notice to the attorney. Such notice need not be in writing, though it is preferable.

In addition to providing notice to the attorney that the power of attorney has been terminated, the donor should similarly inform all third parties who dealt with, or who might reasonably have dealt with, the attorney under the power of attorney. There is no set manner in which to notify third parties of revocation.[134] Once again, for ease of understanding and facility of proof in the event of a dispute, the notice to third parties should be in writing. For speed of receipt, hand delivery is also recommended. The third parties should be informed that the power of attorney is no longer in effect, and that the attorney may no longer act on the donor's behalf.

In addition to providing notice to the attorney and to third parties who might be dealing with the attorney, a donor should also insist that the original power of attorney, as well as any copies in the attorney's possession, should be returned by the attorney. To provide additional protection to the donor, this requirement could be made explicit in the text of the power of attorney.

The relationship between a donor and an attorney, the extent of an attorney's dealings, as well as a donor's initiative and perceived need to take protective steps will vary from situation to situation. Moreover, there is no guarantee that a newspaper advertisement or a notice in the *Royal Gazette*, the official government newspaper, would be a completely effective way to alert third parties of an EPA's revocation. It may not be possible for a donor to predict all of the third parties with whom an attorney may have conducted business. As a result, the Commission does not recommend that EPA legislation require a donor wishing to revoke a power of attorney to take any additional steps, though they may be advisable.

The Commission recommends that:

- EPA legislation should require that a donor who wishes to revoke an EPA must provide notice to the attorney.

18. Substitution and variation

While a donor is mentally competent, he or she may vary any terms of the EPA. He or she may also replace or substitute an attorney. Some jurisdictions have included these common law principles in their legislation. For example, the Newfoundland *Act* states that the donor

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[134] Aldridge, note 79, above, at 57.

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The relationship between a donor and an attorney, the extent of an attorney's dealings, as well as a donor's initiative and perceived need to take protective steps will vary from situation to situation. Moreover, there is no guarantee that a newspaper advertisement or a notice in the *Royal Gazette,* the official government newspaper, would be a completely effective way to alert third parties of an EPA's revocation. It may not be possible for a donor to predict all of the third parties with whom an attorney may have conducted business. As a result, the Commission does not recommend that EPA legislation require a donor wishing to revoke a power of attorney to take any additional steps, though they may be advisable.

The Commission recommends that:

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[134] Aldridge, note 79, above, at 57.

may revoke or terminate an EPA or change the attorney, as long as the donor has legal capacity.[135] Once the donor becomes incompetent and the EPA becomes effective, however, problems arise if the attorney is no longer able to act, dies, becomes mentally incompetent or is otherwise unwilling to act. Neither the U.L.C.C. draft *Act*[136] nor the Saskatchewan legislation[137] allows the court to substitute attorneys. The legislation in Prince Edward Island, Nova Scotia, New Brunswick, and Newfoundland does allow for a person having an interest to apply to the court to substitute another person for the attorney named in the EPA.[138] The Nova Scotia statute also allows a judge of the Supreme Court to "grant such relief as the judge considers appropriate",[139] but it is uncertain whether this would be interpreted to allow the judge to vary the EPA.

New Brunswick also gives the court fairly wide discretion. If an EPA is in place and the donor is mentally incompetent, a New Brunswick court may vary the attorney's powers to manage the estate, if it is in the best interests of the estate.[140]

The Alberta Law Reform Institute was quite critical of allowing a court to substitute an attorney or vary the terms of an EPA. It took the position that court substitution is both artificial and inappropriate and that substitution by the court undermines the fact that an attorney is usually chosen in order to avoid court intervention.[141] The Alberta Institute concluded that if an EPA is no longer sufficient to protect the donor's interests, the appropriate course of action is to apply under adult guardianship legislation to appoint a guardian who can then make decisions for the donor, independently of the EPA and under the court's supervision. The Manitoba legislation, on the other hand, allows the court to substitute another person in place of the original attorney or to vary an EPA "subject to the provisions of the enduring power of attorney".[142]

In the Discussion Paper, this Commission preferred the provision currently contained in the Nova Scotia statute, which allows a court to substitute an attorney where appropriate. The

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[135] Note 20, above, s. 11.

[136] Note 21, above.

[137] Note 20, above.

[138] Prince Edward Island, note 20, above, s. 10; Nova Scotia, note 20, above, s. 5(3); New Brunswick, note 20, above, s. 58.6; Newfoundland, note 20, above, s. 9.

[139] Note 4, above, s. 5(1)(e).

[140] Note 20, above, s. 58.4.

[141] Alberta Report for Discussion, note 31, above, at 94-95.

[142] Note 32, above, s. 24(1).

Commission explained that a court might order substitution, for example, if the attorney is no longer able to act, dies, becomes mentally incapable or is otherwise unwilling to act. If another attorney is available and willing to act, expensive and time-consuming guardianship applications might therefore be avoided.

The Commission also suggested that courts should be authorized to vary an EPA upon the application of an interested party. It may, for example, be appropriate to vary an EPA if the donor specified a charitable donation to be made from the estate and the attorney considered it to be depleting the estate. In those circumstances, the Commission suggested that the court should have the authority to vary the terms of the EPA by discontinuing or removing the charitable donation.

Although the majority of commentators generally agreed with the Commission's suggestions, there was some concern expressed about who should constitute an "interested party". Certain commentators were also concerned that an interested party, through an application, might be able to circumvent a donor's wishes. Upon further consideration, the Commission agrees that the concept of "nearest relative", which is defined at Part III.13 of this Report, would be appropriate as the basis for defining who may make an application for substitution or variation. There would, however, be no ranking of the nearest relatives. Each relative would be equally entitled to make an application, and in the event of competing claims, a court would decide which application had the most merit. The Commission also agrees that an attorney or a named alternate would be an appropriate choice to make an application for substitution or variation. Substitution would only be allowed, though, where the donor had specified an alternate attorney in the EPA. If there is no named alternate, the Public Trustee would serve as attorney pending the appointment of a guardian under the *Incompetent Persons Act*.

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The Commission recommends that:

- Courts should continue to be authorized to remove an attorney, upon application by a nearest relative, or by an attorney or named alternate, where the donor had specified an alternate attorney. Substitution should only be allowed where the donor had specified an alternate attorney.

- "Nearest relative" means an adult person who is related to the donor, mentally competent and included in the following series: spouse, child, grandchild, great-grandchild, parent, sibling, niece or nephew.

- If there is no named alternate, the Public Trustee would serve as attorney pending the appointment of a guardian under the *Incompetent Persons Act*.

- Courts should also be authorized to vary the terms of an EPA upon application by a nearest relative, or by an attorney or named alternate, where the donor had specified an alternate attorney.

19. EPAs made in other places

The issue of whether an EPA made in one jurisdiction will be recognized in another is a complex but significant one. It is especially important in light of increased mobility of people between provinces. The Manitoba Law Reform Commission summarized the law as it applies to EPAs as follows:

> *Stated briefly, the common law position is that the proper law of the agency agreement (usually the law of the place where the agency agreement was made) will govern the obligations between agent and principal (in this case, the attorney and the donor). However, any dealings the agent has with third parties will be governed by the proper law of the contract between them, which may well be the law of a different place. Significantly, it appears that the proper law of the contract between agent and third party will determine the existence and extent of the agent's authority to act for the principal.*[143]

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[143] Manitoba Report, note 8, above, at 34 (footnotes omitted).

The Commission recommends that:

- Courts should continue to be authorized to remove an attorney, upon application by a nearest relative, or by an attorney or named alternate, where the donor had specified an alternate attorney. Substitution should only be allowed where the donor had specified an alternate attorney.

- "Nearest relative" means an adult person who is related to the donor, mentally competent and included in the following series: spouse, child, grandchild, great-grandchild, parent, sibling, niece or nephew.

- If there is no named alternate, the Public Trustee would serve as attorney pending the appointment of a guardian under the *Incompetent Persons Act*.

- Courts should also be authorized to vary the terms of an EPA upon application by a nearest relative, or by an attorney or named alternate, where the donor had specified an alternate attorney.

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[143] Manitoba Report, note 8, above, at 34 (footnotes omitted).

This common law approach has been altered in some jurisdictions. In Alberta and Manitoba, for example, the common law has been altered by allowing the attorney's authority to be determined by the law of the jurisdiction where the EPA was executed. The Alberta legislation specifically provides that an EPA is valid if it is made "according to the law of the place where it has been executed".[144] Manitoba legislation also refers to recognition of foreign EPAs. It states that they are valid in Manitoba if they are valid according to the law of the place where executed and if the EPA states that it is to continue despite the donor becoming mentally incompetent after execution.[145]

In its Discussion Paper, the Commission adopted the Alberta and Manitoba approach whereby an EPA is valid if it is made according to the law of the place where it has been executed. This is straightforward and clearly addresses the problem of EPAs made in other jurisdictions.

The Commission's suggestion met with the general approval of those commentators who addressed the issue. The Commission affirms this suggestion.

The Commission recommends that:

- **An EPA should be valid in Nova Scotia if it is made according to the law of the place where it was executed.**

[144] Note 40, above, s. 3(5).

[145] Note 32, above, s. 25.

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The Commission recommends that:

- **An EPA should be valid in Nova Scotia if it is made according to the law of the place where it was executed.**

[144] Note 40, above, s. 3(5).

[145] Note 32, above, s. 25.

IV SUMMARY OF RECOMMENDATIONS

The Commission recommended that:

1. **Choosing an attorney** [pages 10 - 12]

- An attorney must be:
  - mentally competent and of the age of majority (presently 19 years of age),
  - the Public Trustee, or
  - a government-regulated financial institution.

- An attorney must not be an undischarged bankrupt.

2. **Joint and alternate attorneys** [pages 12 - 13]

- A donor should be able to name any number of attorneys to act on his or her behalf.

- A donor should be able to appoint alternate attorneys to act successively.

- If more than one attorney is named, whether they are to act jointly or successively will depend on the language used in the EPA. The common law, under which multiple attorneys are treated as joint, should only be applied if the EPA is silent on this issue.

3. **Signing on behalf of the donor** [pages 14 - 15]

- When the donor is mentally competent, but otherwise incapable of reading or signing an EPA, an individual (other than the attorney or the attorney's spouse) should be able to sign it on the donor's behalf. The EPA must be signed in the donor's presence, at the donor's direction and in the presence of two or more witnesses who are present at the same time.

- "Spouse" should be defined to include common law spouse, whether of the same or opposite sex. This definition should apply in all instances of EPAs where a spouse might be involved.

4. **Witnesses** [pages 15 - 18]

- An EPA should be witnessed by two people who are present at the same time, neither of whom is:

  1. The attorney or the attorney's spouse.
  2. The donor's spouse.

3. An adult son or daughter of the donor, or an adult person whom the donor has demonstrated a settled intention to treat as his or her son or daughter.
4. A person who is mentally incompetent.
5. A person who is less than the age of majority, presently 19 years of age.

5. Mandatory legal advice [pages 18 - 20]

- A Certificate of Independent Legal Advice should not be required for an EPA to be valid.

6. Registration [pages 20 - 22]

- Registration of EPAs should not be mandatory.

7. Contingent powers of attorney [pages 22 - 24]

- EPA legislation should deal specifically with contingent EPAs.

- If an EPA is contingent upon the onset of the donor's mental incompetence, the donor should be able to specify a person who would conclusively determine when mental incompetence on the part of the donor has occurred. In addition to the person named by the donor, a practicing physician must agree in writing that the donor is mentally incompetent.

- For an EPA contingent upon the donor's mental incompetence, if the EPA does not specify a person to determine the donor's mental incompetence, or if the specified person refuses or is unable to make the determination, then the certificates of two medical practitioners would be required to prove that the contingency has occurred.

8. Duty to act [pages 24 - 26]

- When a donor of an EPA becomes mentally incompetent, the attorney has a duty to act:

  1. if he or she knows or ought reasonably to know that the donor is mentally incompetent; and

  2. if he or she has assumed management of the estate or contracted with the donor to do so.

9. Confidentiality [pages 26 - 27]

- Legislation should authorize the release of confidential information to authorized

people concerning the donor's mental and physical health for the limited purpose of determining whether the contingency of mental incompetence has occurred. Such a change may require an amendment to the *Hospitals Act*, which at section 71 governs the confidentiality of health records.

10. Duty of care [pages 27 - 28]

- EPA legislation should specify that the relationship between donor and attorney is fiduciary in nature. As part of his or her duties, an attorney should be required to account, exercise reasonable care, not make secret profits, and not act contrary to the interests of the donor.

- An attorney should be required to exercise the judgment and care that a reasonably prudent person in comparable circumstances would exercise.

11. Liability of the attorney [pages 29 - 30]

- If the EPA has been terminated or is not valid, an attorney should be protected from liability for having acted in good faith if the attorney did not know and had no reasonable grounds for believing that the attorney's authority had been terminated or lost.

12. Authority to benefit others [pages 30 - 32]

- The legislation should specifically state that an EPA may authorize third party payments, including charitable and seasonal gifts. If the EPA does not authorize such payments, an attorney may not authorize charitable or seasonal gifts.

- An attorney should be able to provide for the reasonable maintenance and support of the donor's dependants.

13. Accounting [pages 32 - 35]

- The donor should be able to request an accounting at any time.

- When the donor is mentally incompetent, the attorney should be required to provide an accounting upon the demand of any person named for that purpose in the EPA. If the donor does not name anyone in the EPA, or if the named person is the attorney or the spouse of the attorney or is deceased or mentally incompetent, the attorney shall provide an annual accounting to the donor's nearest relative.

- "Nearest relative" means the adult person who is related to the donor, mentally competent and first listed in the following series: spouse, child, grandchild, great-

grandchild, parent, sibling, niece or nephew, or where none of these people qualify, the Public Trustee.

- The court should have the discretion to grant an order for accounting, as it considers appropriate.

- An attorney should also be required to account upon termination of an EPA.

14. Protection to third parties [pages 35 - 36]

- If the attorney's authority under the EPA has been terminated, an attorney's act should be valid and binding in favour of and enforceable against any person who did not know of the termination.

15. Renunciation by attorney [pages 36 - 38]

- An attorney should be able to renounce an appointment by giving notice to the donor.

- If the donor is no longer mentally competent and the attorney has assumed management of the estate or contracted to do so, the attorney must apply to court in order to renounce the appointment. In the interim period before the court hears the application, the person should be required to continue to act as attorney.

- Notice of an application to renounce should be given to the Public Trustee.

16. Termination [pages 38 - 40]

- An EPA should terminate if it is revoked by the donor or if the donor dies.

- Subject to the court's right to vary the terms of an EPA, including the right to substitute a named alternate as attorney, an EPA should also terminate upon:
  - the bankruptcy of the attorney;
  - the death or mental incompetence of the attorney;
  - the renunciation of the attorney;
  - the coming to pass of a time or event specified in the EPA; or
  - the appointment of a guardian under the *Incompetent Persons Act*.

- EPA legislation should specify the events which would result in the termination of an EPA.

- The bankruptcy of the donor should not automatically terminate the EPA since the attorney can represent the donor's interests at the bankruptcy proceedings.

17. Revoking a power of attorney - required procedure [pages 40 - 41]

- EPA legislation should require that a donor who wishes to revoke an EPA must provide notice to the attorney.

18. Substitution and variation [pages 41 - 44]

- Courts should continue to be authorized to remove an attorney, upon application by a nearest relative, or by an attorney or named alternate, where the donor had specified an alternate attorney. Substitution should only be allowed where the donor had specified an alternate attorney.

- "Nearest relative" means an adult person who is related to the donor, mentally competent and included in the following series: spouse, child, grandchild, great-grandchild, parent, sibling, niece or nephew.

- If there is no named alternate, the Public Trustee would serve as attorney pending the appointment of a guardian under the *Incompetent Persons Act*.

- Courts should also be authorized to vary the terms of an EPA upon application by a nearest relative, or by an attorney or named alternate, where the donor had specified an alternate attorney.

19. EPAs made in other places [pages 44 - 45]

- An EPA should be valid in Nova Scotia if it is made according to the law of the place where it was executed.

APPENDIX A

LIST OF SUGGESTIONS FROM DISCUSSION PAPER

Appendix A

List of Suggestions from Discussion Paper

The Commission suggests that:

1.

- An attorney must be:
  - mentally competent and of the age of majority (presently 19 years of age),
  - the Public Trustee, or
  - a financial institution.

- An attorney must not be an undischarged bankrupt.

2.

- A donor should be able to name any number of attorneys to act on their behalf.

- If more than one attorney is named, they must act jointly unless the EPA states otherwise. In other words, they must make decisions by unanimous agreement unless the EPA states that they can make decisions by majority agreement.

- A donor should be able to appoint alternate attorneys to act successively.

3.

- When the donor is incapable of reading or signing an EPA, an individual (other than the attorney or the attorney's spouse) should be able to sign it on the donor's behalf. The EPA must be signed in the donor's presence, at the donor's direction and in the presence of two or more witnesses who are present at the same time.

- If a donor is signing an EPA on their own behalf, it must be signed in the presence of two or more witnesses who are present at the same time.

- Spouse should be defined to include common law spouse, whether of the same or opposite sex.

4.

- An EPA should be witnessed by two people who are present at the same time, neither of whom is:
  1. The attorney or the attorney's spouse.
  2. The donor's spouse.
  3. A child of the donor or a person whom the donor has demonstrated a settled intention to treat as his or her child.
  4. A person who is mentally incompetent.
  5. A person who is less than the age of majority, presently 19 years of age.

5. • The Commission invites comment on whether a Certificate of Independent Legal Advice should be required in order for an EPA to be valid. The Certificate of Independent Legal Advice would contain a statement that the donor signed (or acknowledged having signed) the EPA in the presence of the lawyer, that the donor acknowledged that the EPA was voluntarily signed, and that the donor appeared to understand the nature and effect of the document.

• That explanatory notes be part of a checklist supplied by the Nova Scotia Barristers' Society or by the Continuing Legal Education Society of Nova Scotia to assist lawyers in drafting EPAs.

6. • Registration of EPAs should not be mandatory.

7. • EPA legislation should deal specifically with contingent EPAs.

• If an EPA is contingent upon the donor's mental incompetency, the certificates of two medical practitioners should be required to prove that the contingency has occurred.

8. • When a donor of an EPA becomes mentally incompetent, the attorney has a duty to act:

1. if they know or ought reasonably to know that the donor is mentally incompetent; and
2. if they have assumed management of the estate or contracted with the donor to do so.

9. • Legislation should authorize the release of confidential information concerning the donor's mental and physical health for the limited purpose of determining whether the contingency of mental incompetency has occurred.

10. • Legislation should specify that the relationship between a donor and attorney is "fiduciary" in nature and that an attorney therefore has a duty to, among other things: account, exercise reasonable care, not make secret profits, and not act contrary to the interests of the donor.

• An attorney should be required to exercise the judgment and care that a reasonably prudent person in comparable circumstances would exercise.

11. • If the EPA has been terminated or is not valid, an attorney should be protected from liability for having acted in good faith if the attorney did not know and had no reasonable grounds for believing that the attorney's authority had been terminated or lost.

12.

- The legislation should specifically state that an EPA may authorize third party payments, including charitable and seasonal gifts. If the EPA does not authorize such payments, an attorney may not authorize charitable or seasonal gifts.

- An attorney should be able to provide for the reasonable maintenance and support of the donor's dependents.

13.

- The donor should be able to request an accounting at any time.

- When the donor is mentally incompetent, the attorney should be required to provide an accounting upon the demand of any person named for that purpose in the EPA. If the donor does not name anyone in the EPA, or if the named person is the attorney or the spouse of the attorney or is deceased or mentally incompetent, the attorney shall provide an annual accounting to the donor's nearest relative.

- "Nearest relative" means the adult person who is related to the donor, mentally competent and first listed in the following series: spouse, child, grandchild, great-grandchild, parent, sibling, niece or nephew, or where none of these people qualifies, the Public Trustee.

- The court should have the discretion to grant an order for accounting, as it considers appropriate.

- An attorney should also be required to account upon termination of an EPA.

14.

- If the attorney's authority under the enduring power of attorney has been terminated, an attorney's act should be valid and binding in favour of any person who did not know of the termination.

15.

- An attorney should be able to renounce an appointment by giving notice to the donor.

- If the donor is no longer mentally competent and the attorney has assumed management of the estate or contracted to do so, the attorney must apply to court in order to renounce the appointment. In the interim period before the court hears the application, the person should be required to continue to act as attorney.

- Notice of an application to renounce should be given to the Public Trustee.

16. • Courts should continue to be authorized to substitute an attorney upon application by an interested party.

• Courts should also be authorized to vary the terms of an EPA upon application by an interested party.

17. • An EPA should terminate if it is revoked by the donor of if the donor dies.

• Subject to the court's right to vary the terms of an EPA, including the right to substitute an attorney, an EPA should also terminate upon:

- the death or mental incapacity of the attorney;
- the renunciation of the attorney;
- the coming to pass of a time or event specified in the EPA; or
- the appointment of a guardian under the *Incompetent Persons Act*.

• The bankruptcy of the donor should not automatically terminate the EPA since the attorney can represent the donor's interests at the bankruptcy proceedings.

18. • That an EPA should be valid in Nova Scotia if it is made according to the law of the place where it was executed.

APPENDIX B

LIST OF ADVISORY GROUP MEMBERS
AND
PEOPLE AND ORGANIZATIONS WHO COMMENTED ON DISCUSSION PAPER

APPENDIX B

List of Advisory Group Members
And
People and Organizations Who Commented on
Discussion Paper

Members of Advisory Group:

Roberta J. Clarke, Q.C.	Lawyer
Wayne Cochrane	Lawyer, Dept. of Health (N.S.)
Kathryn Garden	Executive Director, Alzheimer Society of Nova Scotia
Philip J. Jenkins	Investment Advisor, RBC Dominion Securities
Wayne G. Ripley	Will and Estate Planner, Royal Trust
Estelle Theriault, Q.C.	Public Trustee
Brian Vandervaart	Director, Nova Scotia Senior Citizens Commission\Secretariat

Written comments on Discussion Paper:

Remi J. Chiasson	Member of the Public
Trevor I. Hughes	President and Chief Executive Officer, Evangeline Trust Company
Linda Kiley	Manager, Fiduciary Services, Scotiatrust
Peter A. Lohnes	Chair, CBA-Nova Scotia Wills and Trusts Section
William M. MacDonald	Manager, Deposit Services, League Savings and Mortgage
Wayne G. Ripley	Will and Estate Planner, Royal Trust
Robert L. Smith	Member of the Public

Oral comments on Discussion Paper:

Tom Khattar	Lawyer
Wayne G. Ripley	Will and Estate Planner, Royal Trust
CBA-Nova Scotia Health Law Section	
Participants at CBA - Nova Scotia Legislation and Law Review Committee Fall Forum, Dalhousie University	